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Date: June 10, 2025

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1006-23T2

STATE OF NEW JERSEY,		CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of
	:	Conviction and Order of the
v.	:	Superior Court of New Jersey,
	:	Law Division, Cumberland County
GREGORY A. COOMBS,	:	Ind. No. 20-01-0103
	:	
Defendant-Appellant.	:	
	:	Sat Below:
	:	Hon. Cristen P. D'Arrigo, J.S.C.,
	:	and a jury
	:	

BRIEF ON BEHALF OF DEFENDANT-APPELLANT

DEFENDANT IS CONFINED

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TABLE OF JUDGMENTS, ORDERS AND RULINGS

[1] While defendant is aware that ordinarily R. 2:6-1(a)(2) bars the inclusion in the appendix of briefs from the court below, the motion brief that was filed for defendant below is included in the appendix because it contains the only reference to certain legal arguments that were asserted below.

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PROCEDURAL HISTORY

The Cumberland County Grand Jury returned Indictment 20-01-0103 charging defendant Gregory Coombs[2] with: purposeful or knowing murder, contrary to N.J.S.A. 2C:11-3a(1) or N.J.S.A. 2C:11-3a(2) (Count One); first-degree conspiracy to commit murder, contrary to N.J.S.A. 2C:5-2 and N.J.S.A. 2C:11-3a(1) (Count Two); and second-degree burglary, contrary to N.J.S.A. 2C:18-2a(1) (Count Four) (Da 1 to 6)[3]

In an order filed on September 21, 2021, the Honorable Cristen P. D'Arrigo, J.S.C., denied defendant's motion to suppress evidence. (Da 4 to 5) Defendant's case was then tried in January through March 2023 before Judge D'Arrigo and a jury, and defendant was acquitted of murder and second-degree burglary, but convicted of conspiracy to murder. (Da 6 to 8) On September 11, 2023, defendant was sentenced to serve a discretionary extended prison term of 36 years, 85% without parole, and ordered to pay the usual fees and penalties, plus restitution split between him and codefendant Lewis. (Da 9 to 12)

Defendant filed his notice of appeal on December 5, 2023, as within time with the permission of this Court, and amended it on June 6, 2025. (Da 19 to 24)

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[2] The indictment also charged two codefendants, Clive Lewis (who was tried with defendant) and Deontray Gross, with the same crimes as defendant, plus some additional crimes charged against Lewis that are of no relevance to defendant's appeal. (Da 1 to 3)

[3] Da – defendant's appendix for this appeal
PSR – presentence report

STATEMENT OF FACTS

Defendant Gregory Coombs was convicted of conspiracy to murder, but acquitted of the two other charged crimes: knowing or purposeful murder and burglary. The State contended that defendant was the driver in a rental SUV that parked near the home of Derrick Harris in Bridgeton whereupon two men -- codefendant Cleve Lewis and turncoat witness Deontray Gross -- exited the vehicle, went to Harris' home, and shot him when he answered the door. The State presented the following evidence at trial[4] that is relevant to this appeal.

Shante Brooks testified that she was Derrick Harris' girlfriend and lived with him at Unit 2K in Delsea Gardens apartment complex. (11T 146-22 to 147-10) That apartment is located right next to Millville Motor Lodge, which is separated from Delsea Gardens by a fence, but that fence has a hole in it. (11T 156-6 to 22) Harris had a criminal history involving "drugs and stuff like that" according to Brooks. (11T 147-16 to 20) Brooks testified that at about 8 p.m. on November 6, 2019, there was a knock on their front door, but neither she nor Harris answered the door. (11T 154-8 to 157-13) A few hours later, about 11 p.m., there was another knock, according to Brooks, and this time Harris got dressed and answered the door, whereupon -- after Brooks looked out the upstairs window to see someone wearing "penny color" Nike Foamposite

[4] The testimony relevant to the motion to suppress that is addressed in Point II, infra, is set forth in that point.

sneakers standing outside the door -- Harris was shot dead. (11T 158-14 to 162-13) When Brooks went part of the way downstairs, she saw Harris lying on the dining room floor, neither moving nor breathing, and she noticed the front door "cracked [open] a little bit." (11T 163-3 to 21) Harris suffered eight gunshot wounds and the medical examiner ruled his cause of death to be "multiple gunshot wounds." (15T 59-20 to 60-4)

As soon as she discovered Harris' body, Brooks called her aunt and asked her to call 911. (11T 163-23 to 25) Brooks testified that when she had looked out the window at the 11 p.m. knock, she only saw one person at the door, and did not make eye contact with that person, but, when she reviewed surveillance footage from the apartment complex, she saw that there "might have been more" than one person that came from the motor lodge next door and knocked on the door. (11T 162-11 to 16; 11T 164-3 to 19)

Brooks described Deontray Gross, who eventually testified for the State at trial, as "best friends" with Harris, and she said he had been to their house a number of times and used the wifi there, which is a network called "Shante." (14T 14-16 to 15-13) Brooks does not know defendant and has only heard of codefendant Lewis because Harris, Gross, and Lewis all "grew up together." (14T 16-6 to 13; 14T 41-14 to 17) Brooks even told police after defendant's arrest that she does not know what possible role defendant could have played in Harris' death. (14T 51-8) Cross-examination focused on two other people with

possible motives to kill Harris: Germaine Brian, with whom Brooks was romantically involved while Harris was in prison "for a couple of months," and whom Harris may have threatened, and Taron Hart, who Brooks said was a drug dealer that had previously visited Harris to complain that something had been stolen from him, implying that Harris was involved. (14T 28-12 to 32-3; 14T 43-11 to 48-4)

Lieutenant George Chopek confirmed that there is a hole in the fence that borders Delsea Gardens and the motor lodge. (14T 87-16 to 20) Chopek testified that, sometime after 1 a.m. on November 7, he was contacted by Sergeant Brandon Kavanaugh who said that he had spotted a black SUV that generally fit a description of a vehicle seen in the area earlier, and Chopek told Kavanaugh to stop the vehicle, a Ford Expedition. (14T 90-20 to 92-13) When Chopek arrived at the scene of the stop, the driver -- defendant -- and the passenger, Deontray Gross, were "removed from the vehicle and eventually taken down to Millville Police Department" with no resistance. (14T 92-16 to 24; 14T 96-20 to 21; 14T 108-4 to 12)

Sergeant Kavanaugh testified at trial that he arrived at Delsea Gardens at 12:09 a.m. and reviewed surveillance footage, after which he drove out of the complex at 1:18 a.m. whereupon he spotted an SUV pulling out of the complex, matching a description that Chopek had given him after canvassing the area. (20T 212-2 to 217-11) He followed the SUV and watched it turn into the parking

lot at Larry's Bar, 11 blocks from the apartment complex, and park briefly while a passenger, later identified as Deontray Gross, got out of the car, went into the bar briefly, and then returned to the SUV. (20T 219-10 to 221-25; 20T 226-13 to 20) Kavanaugh first testified that he could not recall if Gross had anything in his hands when leaving or returning to the SUV. (20T 220-19 to 24) But then later in his testimony, Kavanaugh said Gross appeared to have "something" in his right hand when he returned to the SUV. (20T 237-19 to 22; 20T 241-18 to 242-2)

Kavanaugh testified that he continued to follow the SUV and that, when it turned onto Powell Street, he called Chopek, who told him to initiate a stop of the vehicle, which he did. (20T 222-4 to 223-2) Defendant was driving the SUV, and was cooperative at the stop, and a search of his person revealed no contraband, Kavanaugh testified. (20T 225-8 to 229-12) When the stop first occurred, Kavanaugh claimed, Gross tried to walk away from the scene, but returned when ordered to do so. (20T 246-7 to 17)

Once the men were taken into custody and transported to the Millville Police Department headquarters, Gross was placed into an interview room, and interrogated at 3:25 a.m. by Detective Ricardo Ramos, after which Ramos and another detective named Martinez interrogated defendant. (16T 29-9 to 30-13). Ramos described defendant as a "[l]ittle upset," and that he was saying "that it was dumb" that he was in custody, and that "this is stupid." (16T 30-17 to 19;

18T 9-4 to 5) During the interrogation, defendant admitted that he was the only person driving the SUV, that it was his rental vehicle, and that he had "been everywhere" that day in that vehicle. (18T 5-16 to 16-5) He admitted hanging out "smoking and drinking" during part of the day with Deontray Gross, and also admitted driving to Delsea Gardens. (18T 16-24 to 19-15) Defendant first said, "I don't know," when asked whom he visited in Delsea Gardens, but then said, "This dude. I don't know nobody else there." (18T 19-3 to 7) He also said he did not know: whom Gross visited, whether Gross and the codefendant stopped at an apartment, or whether they stopped anywhere at all, and he claimed to only be interested in learning from the detectives "what the funk [sic] going on." (18T 19-8 to 15)

Ramos testified that he viewed surveillance footage from Delsea Gardens that showed two men exit a Ford Expedition, which had been driving around the area, after which those two men came through the hole in the fence between the motor lodge and Delsea Gardens, knocked on Harris' door, and shot him when he answered, leaving through the hole in the fence after the shooting. (16T 96-5 to 98-9) The men arrived at the scene at 11:05 p.m., according to Ramos, and left at 11:17 p.m. (16T 111-13 to 112-8) A similar SUV was then seen on surveillance at Delsea Gardens, according to Ramos, at 1:10 a.m. and 1:18 a.m. (16T 131-1 to 13)

Ramos testified further that at 11:20 p.m. Deontray Gross' phone was

connected to the "Shante" wifi network at Harris' apartment, and that that same phone connected to the wifi at Gross' own residence at 12:44 a.m. (16T 133-5 to 24) Ramos admitted that Shante Brooks told him that Harris and Germaine Brian had "exchanged some words" in July 2019 over Brian's relationship with Brooks while Harris was in prison. (18T 49-15 to 25) Further, Ramos admitted that he had learned that Taron Hart had placed a "bounty" on Harris, and also on Deontray Gross, but that police did not investigate that angle. (18T 51-17 to 52-9) Ramos also admitted on cross-examination that he had no indication from the surveillance video that he viewed that defendant ever exited the SUV at the motor lodge or Delsea Gardens that night and that there was no forensic evidence to tie defendant to the shooting. (18T 63-12 to 64-7)

Ramos also admitted on cross-examination that police had information from Shante Brooks that Gross was involved with the Bloods gang and "had changed over to Crips." (18T 65-1 to 23) Ramos agreed that despite their supposed close and long friendship, Gross had received, but not accepted, a friend request on Facebook from Harris "in the days leading up to" the shooting. (18T 68-17 to 69-1) Further, Gross had received a friend request followed by a message from someone named John Kenyon on October 26, 2019, that told Gross: "[C]ome see me." (18T 69-5 to 20) Additionally, Ramos admitted that Gross and codefendant Lewis, but not defendant, were in "frequent contact" via Facebook messages in the days leading up to the shooting and that those

messages specifically mentioned the two men getting together on November 6. (18T 70-3 to 71-6) Around the same time, Gross was also sending threatening messages to someone named Steve Hanna over a monetary debt that Hanna owed. (18T71-10 to 72-5)

Ramos also admitted on cross-examination that, in the surveillance video that he watched, it appeared that Gross did not knock on the door of Harris' apartment, but rather that he instructed codefendant Lewis to do so -- even appearing to tell him to knock harder -- after pointing out the correct door to Lewis. (18T 72-21 to 73-10) Further, Ramos agreed that a search of the infotainment system in the SUV -- which logs everything from stops to the playing of music to whether a particular door opened -- never showed defendant getting out of the SUV at any of the twenty or so stops that the vehicle made that night, which, above and beyond the time spent at Delsea Village, included multiple stops at Wawa, at least two stops at Burger King, and a stop at Larry's Bar. (18T 73-15 to 75-7) Ramos agreed on cross-examination that Gross owned two BMWs, one black and one gray, and that the gray one was parked at the address where codefendant Lewis was dropped off after the incident. (18T 75-18 to 76-12) According to Ramos, Gross also was caught on jail calls trying to get one of the cars towed and "cleaned up." (18T 76-25 to 78-16) Ramos agreed that despite the fact that police thought they saw "someone" put an item into the black BMW on the night of the incident, Gross' black BMW was not impounded

until November 13, and the gray one was impounded eight days after that. (18T 79-13 to 80-3) Ramos did not recall whether police viewed any surveillance to see if anyone accessed those cars between the night of the incident and their impoundment. (18T 80-4 to 10)

Robert Rosell, a property manager for Seabrook Housing Corporation, testified that, as of April 12, 2019, defendant rented a home at 1107 First Avenue in Seabrook for himself and Tenalia Coombs, and that Rosell has never heard the name of codefendant Cleve Lewis affiliated with any of his properties. (18T 110-9 to 111-2; 18T 115-5 to 7) He also testified that the current resident as of the time of trial was Gerrell Black. (18T 113-4 to 6)

Deontray Gross, testifying pursuant to an "open plea"[5] deal for conspiracy to murder and attempted murder (the latter charge being from another case), and "hoping" for leniency based on his testimony, claimed Derrick Harris was his "best friend" and that he knew him from age seven or eight. (25T 9-23 to 10-1) However, he claimed they did not speak much after July 2019 because of a disagreement over whether Brooks was cheating on Harris when he had been imprisoned. (25T 24-22 to 25-11)

Gross claimed that in 2018 he and Harris had stolen about $100,000 from

[5] The website for the Department of Corrections indicates Gross' ultimate sentence was only seven years, 85% without parole -- in other words a second-degree sentence for two first-degree crimes.

someone named Chuck, who turned out to be Taron Hart, who had then learned about the theft and placed a substantial bounty on both Harris and Gross. (25T25-19 to 27-25; 25T 48-25 to 49-8; 25T 96-12 to 13) Gross testified that prior to November 6, 2019, he did not know defendant, but had grown up with codefendant Lewis, who was sometimes living at defendant's Seabrook address in 2019. (25T 29-21 to 35-4) Gross claimed that on November 6, he messaged with Lewis about drinking some liquor together, and Lewis told him to come over, so Gross drove his gray BMW to the Seabrook address, leaving the black BMW at his home in Vineland, a few minutes away. (25T 42-2 to 44-9) There, he met up with codefendant Lewis and also met defendant for the first time, he claimed. (25T 45-2 to 24) They were in the dining room, drinking, at a table where there were two guns, according to Gross, and, at one point, after drinking a shot, Gross claimed defendant said, "So this the one that hit the lick?" -- which Gross interpreted to mean that defendant knew about the theft from Taron Hart. (25T 46-5 to 48-16) Gross claimed he was somewhat alarmed that a person that he did not know knew about his role in the theft, and so he went outside to smoke a cigarette, but was joined soon thereafter by defendant, who told him to just do whatever codefendant Lewis told him to do. (25T 48-18 to 54-8) Soon thereafter, according to Gross, they were joined by Lewis, who was holding one of the guns from the table; Gross did not see a gun in defendant's possession. (25T 54-9 to 25)

Gross testified that Lewis pointed the gun at him, making him both fear for his life and want to do whatever was necessary to comply. (25T 55-16 to 23) According to Gross, Lewis told him to get into the front passenger seat of the SUV, which he did, and defendant got into the driver's seat while Lewis sat, with the gun, in the rear passenger area. (25T 56-2 to 57-8) All three men had their phones on them, Gross claimed. (25T 57-9 to 12) They drove to Gross' home in Vineland, he testified, because they wanted him to change out of the "bright" shoes that he was wearing. (25T 57-14 to 58-24) On the way, Gross claimed, the two men told Gross he was going to have to knock on Harris' door at some point, but when they arrived at Gross' home, and defendant and Lewis waited in the car, Gross did not call the police when he got inside because he does not trust police. (25T 60-1 to 61-14)

Inside, Gross testified, he changed his shoes and grabbed "the drugs I had" as well as some gloves for the others, but only Lewis and he wore them. (25T 62-1 to 63-22) Gross claimed that he gave the drugs to defendant, so the two men would not come back later and stage a robbery in his home; he also then admitted that he left some drugs in his home. (25T 66-1 to 13) Gross testified that they then drove to Delsea Gardens at about 8:40 p.m. (25T 65-5 to 22) His understanding was that they were going to rob Harris, not kill him, he claimed, and that his role was solely to knock on the door, despite the fact that he later pled to conspiracy to murder, which requires a purpose to kill. (25T 66-14 to 23;

89-5 to 90-4; 26T 42-18 to 44-6) Gross testified that he was not telling the truth at that plea hearing about his intent regarding the scope of the conspiracy. (26T 42-18 to 44-6)

Gross claimed that defendant was "aware of the planning" and was supposed to be just a driver and a lookout. (25T 69-4 to 15) Lewis told everyone to turn off their phones, which Gross claimed they all did. (25T 70-5 to 13) However, Gross turned his phone back on at some later point that night. (25T 101-15 to 19) Gross testified that he and Lewis were both wearing Nike Foamposite sneakers, and that his were green while Lewis' were purple. (25T 72-1 to 9) Gross also testified that defendant parked at a "hotel type of thing" next door to Delsea Gardens and that he and Lewis climbed through the hole in the fence, and went to Harris' door -- which, depending on the page of Gross' testimony that one reads, either Lewis or Gross knocked on -- but there was no answer and they returned to the SUV shortly after 9 p.m. (25T 73-3 to 80-15)

Thereafter, Gross claimed, at Lewis' instruction, defendant drove them to another nearby apartment complex to find the home of Harris' girlfriend's sister, but Gross claimed that he directed them to the wrong apartment on purpose so they would not rob her. (25T 90-11 to 92-4) Then they made a stop at Gross' cousin's house in Delsea Garden, at the alleged direction of defendant, who "want[ed] some weed," according to Gross, but Gross returned to the SUV emptyhanded because he was afraid that Lewis and defendant might later rob

his cousin if they knew he had marijuana. (25T 92-5 to 93-12)

Thereafter, Gross testified, they drove to a nearby Wawa, where defendant told Gross to get out of the vehicle and pointed out a white truck which was parked across the street and belonged to Taron Hart ("Chuck"). (25T 95-1 to 25) Gross testified that defendant asked Gross if he knew who owned the truck, and, while Gross knew, he denied it. (25T 95-16 to 23) They then all headed back to Delsea Gardens in the SUV, and parked once again at the motor lodge next door, according to Gross, after which Gross and Lewis exited the vehicle while defendant stayed in the driver's seat. (25T 102-17 to 103-6) Gross testified that he and Lewis cut through the fence and both of them knocked on Harris' door this time, but that, when there was initially no answer, Gross walked away and only heard multiple shots thereafter, but did not see the shots being fired. (25T 104-9 to 105-22) Both he and Lewis then ran back to the SUV. (25T 105-25 to 106-23)

When they left the motor-lodge parking lot at 11:20 p.m., Gross testified, they drove back to 1107 First Avenue in Seabrook to drop off Lewis, who said he had to work in the morning. (25T 112-19 to 113-25) On the way, Gross claimed, Lewis said something to defendant about splitting $50,000 -- with the implication that they were being paid that amount for what had just occurred. (25T 117-8 to 119-5) At the Seabrook residence, Gross testified, he tried to get into his BMW that was parked there but realized he no longer had his keys with

him, and defendant told him to get back in the SUV so he could take him home. (25T 121-16 to 122-7) Lewis also took the gun with him into the residence, Gross testified. (25T 123-22 to 25) But on the way to Gross' residence, Gross got a couple of calls from a friend telling him that Harris had been shot at, so Gross decided that, after stopping home where he got changed, he would like to go back to Delsea Gardens to check on Harris, and defendant agreed to take him there. (25T 124-19 to 133-21) But, according to Gross, when defendant saw the heavy police presence at Delsea Gardens, he decided to leave without dropping off Gross, and they were pulled over by police after stopping briefly at Larry's Bar thereafter. (25T 133-22 to 134-25) They had stopped at the bar hoping that the police vehicle behind them would move on, Gross claimed, but that plan did not work out. (25T 134-20 to 25)

On cross-examination, Gross admitted that he "kind of didn't believe" that there was a bounty on him and Harris at the time (26T 26-12 to 18), and without such a bounty, codefendant's counsel pointed out that there would be no motive for either Lewis or defendant to harm Harris. (26T 25-15 to 19) On cross-examination, Gross also agreed that he avoided exposure to more than a life term in prison by accepting a deal to testify against defendant and Lewis. (26T 56-11 to 59-22) Gross denied knowing who the "John Kenyon" who messaged him was, and said that he did not send a threatening message to Steve Hanna and does not know who that is. (26T 96-17 to 98-10) He also said that phone and

infotainment data that showed the SUV making "20 or more" stops overall was incorrect. (26T 114-10 to 15) On redirect, the State got Gross to agree that both Lewis and defendant "knew what was going on" that night -- a somewhat strange statement when knowledge alone is not a sufficient mental state for a conspiracy. (26T 158-24 to 159-7)

Trooper Richard Echevarria testified that on November 14, 2019, he searched the SUV for latent fingerprints, but found none. (22T 55-20 to 25; 22T 57-18 to 19) Similarly, a state-police forensic scientist named Kristen Ruskie testified that swabs from the SUV did not contain blood. (19T 60-22 to 61-3)

Detective Ronald Clouser testified that nine .40-caliber Smith and Wesson shell casings were recovered from the shooting scene. (14T 140-13 to 16) A search of the SUV revealed the following relevant items: a rental agreement in defendant's name, beginning on October 16, 2019; gloves in the front passenger-side door; "turnpike stubs"; a letter addressed to defendant; cash; debit cards in defendant's name; "various keys"; an insurance card in defendant's name; and a six-pack of beer plus another bottle of alcohol on the floor of the front passenger side. (14T 144-9 to 25; 14T 150-10 to 151-12; 14T 159-23 to 160-2; 15T 26-6 to 15) Gross' black BMW was searched on November 14, 2019, and revealed only property of Gross'. (14T 163-25 to 170-25) A December 5, 2029, search of the residence at 1107 First Avenue revealed only six .357-Magnum bullets as well as clothing. (15T 14-8 to 15-13; 14T 173-9 to 11)

Detective Catherine Shipley testified that the clothing seized at 1107 First Avenue included a pair of purple and white Foamposite sneakers. (18T 144-9 to 24) The bedroom in which those sneakers were found "had identifiers" that matched codefendant Lewis, according to Shipley, whereas another bedroom in the home appeared to be defendant's. (18T 145-10 to 13) The day after Gross' arrest, Gross got his gray BMW towed from near defendant's home to his own Vineland Village residence, but Shipley does not know how he did that. (18T 169-19 to 22) That gray BMW was unsecured for 13 days after Gross' arrest before it was impounded and the black BMW was unsecured for six days after that arrest before it was impounded; the searches of those vehicles after impoundment revealed nothing of evidential value. (18T 172-8 to 19; 18T 175-13 to 17)

Gerell Black, defendant's girlfriend, testified that codefendant Lewis stayed "from time to time" in November 2019 at the 1107 First Avenue residence that she shared with defendant. (22T 86-21 to 24) Investigator Thomas Chang testified to multiple geolocation data from the infotainment system of the SUV that placed that vehicle in various locations, not detailed here, from Delsea Gardens to the surrounding area that generally matched the State's allegations regarding the location of that SUV. (20T 67-24 to 68-14; 22T 29-4 to 41-25) Detective Kevin Sobotka testified to various data, extracted from that same infotainment system, to show various doors on the SUV opening at various

times, but he admitted that if the infotainment system is off, it does not record events. (20T 203-3 to 10) Notably, it rarely showed the driver's door opening; it did so only at 11:46 p.m., which was after the shooting had already occurred, and again at 1:33 a.m. (20T 191-2 to 193-2) Risa Ysla, a state-police forensic scientist, testified that DNA from a glove found in the front passenger door of the SUV matched codefendant Lewis, but excluded defendant. (19T 86-20 to 87-9; 19T 92-21 to 93-13)

Investigator Paul Hoffman testified that defendant placed five calls from the county jail on November 7, 2019, none of which were answered, to a cell phone associated with codefendant Lewis. (23T 13-20 to 15-4) Lieutenant Ryan Breslin testified that he investigated the Facebook pages of defendant, Lewis, Gross, and Harris. (23T 77-20 to 23) Breslin claimed that on November 4, 2019, defendant and Lewis discussed the fact that defendant had a truck, and, when Lewis said that he "got a new toy," defendant responded, "I bet." (23T 99-10 to 100-17) Breslin also testified that Lewis sent the message, "Really appreciate you, bro. Love and be safe," to Gross on November 4, and that Gross responded in kind. (23T 104-20 to 105-7) Also, on November 6, Gross messaged Lewis that he had a "bottle" they should drink, and Lewis told him to "[p]ull up." (23T 106-4 to 20) Nothing of value was found in Harris' Facebook records, according to Breslin, other than an unaccepted friend request that he sent to Lewis on October 31, 2019. (23T 108-19 to 21; 23T 117-22 to 120-6) Breslin also agreed

that police never investigated who "John Kenyon" was despite the fact that he sent Gross an unresponded-to friend request on October 26 and told Gross to "come see" him. (23T 119-4 to 121-1) Breslin agreed that Gross was otherwise active on Facebook at the time he got those friend requests. (23T 125-13 to 126-14) Breslin also repeated the testimony regarding Gross messaging Steve Hanna with a threat in "late October" regarding the "fucking money" that Gross said Hanna owed him. (23T 122-20 to 125-8) Breslin agreed that police never investigated Hanna's Facebook page. (23T 125-8 to 10)

Detective Harvey Calixto testified that much of the surveillance footage that police reviewed regarding the case was "grainy." (28T 123-4 to 6) He also testified that phone records do not show any calls between defendant and codefendant Lewis between 10 p.m. on November 6 and 3 a.m. on November 7. (28T 196-23 to 197-13) He also admitted that Gross told police that defendant was never actually discussed as a "lookout" for the actions of Gross and Lewis at the door of Harris' residence. (28T 230-7 to 231-19) He also agreed that if defendant were in the SUV, parked 444 feet from the door of Harris' residence, as the State believed he was, he would not have been able to see a shooting take place because fences and trees were in the way. (28T231-20 to 232-7) Indeed, he admitted, police viewed surveillance footage that showed Gross appearing to act "more like the lookout" for Lewis at the scene. (28T 232-24 to 16) Finally, Calixta agreed that no ballistics evidence, DNA, or fingerprints tied defendant

to these crimes and that there were no phone calls or text messages implicating defendant in the planning of the death of Harris. (29T 62-1 to 64-2) Moreover, Calixto admitted that, despite Gross' testimony, law enforcement believed defendant's phone to have been turned on the entire evening of the incident -- "before, during, and after" the shooting -- because it was paired to the infotainment system in the SUV. (29T 63-22 to 64-6)

Detective Miguel Martinez testified for the defense that an investigator located some motor-lodge residents who heard the shots that were fired at Harris, but others who did not, thereby furthering the theory that defendant would not necessarily have heard the shots while sitting in an SUV at the motor lodge. (29T 156-2 to 15)

LEGAL ARGUMENT

POINT I

THE JURY INSTRUCTIONS ON CONSPIRACY TO MURDER FAILED TO RESTRICT SUCH A CONSPIRACY TO A PURPOSEFUL AGREEMENT TO KILL, BUT, RATHER, EXPANDED IT TO INCLUDE AGREEMENTS IN WHICH ONE OR MORE OF THE PARTICPANTS MERELY KNEW THAT DEATH COULD RESULT BUT DID NOT PURPOSELY INTEND IT, OR EVEN AGREEMENTS IN WHICH ONLY SERIOUS INJURY (OR LESS) WAS INTENDED BY DEFENDANT, BUT THE VICTIM HAPPENED TO DIE. (NOT RAISED BELOW)

The actual evidence in this case of a conspiracy involving defendant -- i.e., an agreement -- to commit a particular crime was vague. The question of what crime defendant agreed to commit was a jury question, but it was one that had to be properly explained to the jury, because, as will be discussed in this point, conspiracy to murder is a very narrowly defined crime -- much narrower than the substantive crime of murder. Conspiracy to murder is limited to agreements only to purposefully kill, not to do so knowingly or to cause serious bodily injury that happens to result in death.[6]

[6] A conspiracy merely to seriously injure someone (even if that person dies later) is only a conspiracy to commit second-degree aggravated assault, N.J.S.A. 2C:12-1b(1), because that is all that was purposely intended. See N.J.S.A. 2C:5-2a; N.J.S.A. 2C:5-4a; N.J.S.A. 2C:12-1b(1); State v. LeFurge, 101 N.J. 404, 421

Unfortunately, here, the jury instruction on conspiracy to murder allowed the jury to convict for levels of criminal intent that fall well short of what is necessary to convict for conspiracy to murder. (31T 204-24 to 210-16) Consequently, defendant's Fourteenth Amendment and state-constitutional rights to due process and a fair trial were violated, and his conviction for conspiracy to murder should be reversed and that count remanded for retrial.

Conspiracy, N.J.S.A. 2C:5-2, like a criminal attempt, N.J.S.A. 2C:5-1, is an inchoate offense. Both require a purposeful state of mind toward accomplishing the criminal result. State v. Harmon, 104 N.J. 189, 203 (1986). Thus, while "murder" under N.J.S.A. 2C:11-3 can be committed in any of five ways -- i.e., (1) a purposeful killing; (2) a knowing killing; (3) a purposeful infliction of serious bodily injury (SBI) that then results in death; (4) a knowing infliction of SBI that then results in death; or (5) the causing of death during a felony -- an attempted murder can only be a purposeful attempt to kill. State v. Rhett, 127 N.J. 3, 7 (1992). "Although an actor may be guilty of murder if he or she intended to kill or was practically certain that his or her actions would cause or would be likely to cause death, the actor is guilty of attempted murder only if he or she actually intended the result, namely, death, to occur." Id. The Criminal

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(1986) ("[T]he Code grades conspiracy as a crime of the same degree as the most serious crime that is its object"). (Emphasis added).

"Code requires that to be guilty of attempted murder, a defendant must have purposely intended to cause the particular result that is the necessary element of the underlying offense -- death." Id.

The same is true of a conspiracy. A conspiracy to murder is an agreement only to purposely kill. State v. Abrams, 256 N.J. Super. 390, 399-401 (App. Div.), certif. den. 170 N.J. 395 (1992); see also State v. Madden, 61 N.J. 377, 395 (1972) (equating a conspiracy to murder with a "conspiracy to kill") (emphasis added); State v. Castagna, 400 N.J. Super. 164, 188 (App. Div. 2008) (same as Madden); State v. Fornino, 223 N.J. Super. 531, 536-537 (App. Div.), certif. den. 111 N.J. 570 (1988) (when analyzing the sufficiency of evidence to prove a conspiracy to murder, the appellate court was focused on whether the evidence showed that the conspirators "planned to kill the [victims]") (emphasis added); State v. Downey, 206 N.J. Super. 382, 395 (App. Div. 1986) (same as Madden); State v. Hines, 109 N.J. Super. 298, 302 (App. Div. 1970) (same as Madden).

Indeed, the Model Penal Code (MPC), upon which Title 2C is based, makes it clear that conspiracy to murder only includes conspiracies to purposely kill. See Model Penal Code, Sec. 5.03, "Criminal Conspiracy" ("The purpose requirement is meant to extend to result and conduct elements of the offense that is the object of the conspiracy"). Thus, the MPC commentary makes clear that if actors conspire to blow up a building, knowing -- but not purposely intending

-- that people will die as a result, "they are nevertheless guilty only of a conspiracy to blow up the building" and not of a conspiracy to murder, even if people die. Model Penal Code Commentary, Sec 5.03 at 407-408. "[I]t would not be sufficient" for a conspiracy to murder "if the actor only believed that the result" -- death -- would be produced but did not consciously plan or desire" that result. Id.

Thus, it follows that there is no such thing as an attempt or conspiracy to commit any of the following homicide crimes because they all require less than a purpose to kill: a knowing murder, a purposeful SBI murder, a knowing SBI murder, a felony murder, or an aggravated or reckless manslaughter. Rhett, 127 N.J. at 7, citing State v. Darby, 200 N.J. Super. 327, 331 (App. Div. 1994); see also State v. Robinson, 136 N.J. 476, 485-486 (1994) (rejecting as a "commonsense" matter the idea of less than a purposeful intent to kill for an attempted homicide, but finding that attempted passion/provocation manslaughter is an offense because passion/provocation manslaughter in such a circumstance "is an intentional [i.e., purposeful] crime").

Yet, despite the clear limitation that a conspiracy to murder is only an agreement to purposely kill, the jury instructions never told the jury that limitation. Instead, the jurors were told over and over the wrong law: that the question before them for the count charging conspiracy was whether there was an agreement to promote or facilitate the "crime of murder," which they were

told includes, purposeful, knowing and SBI murder -- as instructed to them previously. (31T 207-13 to 14; 31T 208-10 to 17; 30T 177-2 to 178-22; 30T180-12 to 183-6) This jury was, thus, incorrectly told to return a verdict of guilty for conspiracy to murder if the jury found an agreement to do any of the following: purposely kill, purposely cause serious injury (SBI) that happened to kill the victim, knowingly kill, or knowingly cause serious injury (SBI) that happened to kill the victim. (31T 204-24 to 210-16; 30T 177-2 to 178-22; 30T180-12 to 183-6) Obviously, when only an agreement to purposely kill is a conspiracy to murder, Abrams, 256 N.J. Super. at 399-401; Madden, 61 N.J. at 395, jury instructions that said otherwise -- effectively allowing a conspiracy to cause serious injury or to knowingly (rather than purposely) kill -- were a fundamental misstatement of the law that allowed verdicts for conspiracy to murder on less than the elements required by law.

Such an error was particularly devastating to the defense in this case because there could be a legitimate dispute as to what the "agreement" was to do.[7] A reasonable juror that believed that defendant and the codefendant agreed

[7] Indeed, Deontray Gross testified that when he initially got into the SUV and headed toward the victim's house, he believed the plan was merely to rob Harris, not kill him, and that he was not telling the truth at his plea hearing when he said the plan was to purposely kill Harris. (25T 66-14 to 23; 89-5 to 90-4; 26T 42-18 to 44-6) Moreover, more than question from the State at trial focused on whether defendant "kn[e]w what was going on," but knowledge is an insufficient

to do something together to scare or terrorize or rob or even seriously injure the victim could doubt whether that "something" was an agreement to purposely kill him. Yet the jurors not only had no idea that only such a narrow definition of conspiracy to murder applied; in fact, they were told specifically the wrong law: that an agreement to seriously injure the victim after which he happened to die would still be a conspiracy to murder, when it plainly is not.

Indeed, here, the judge incorrectly made it even more likely that the eventual verdict was for an agreement to commit less than a purposeful killing when he referred to the crime as a purposeful or knowing conspiracy to commit "criminal homicide" -- which, obviously includes purposeful, knowing, and reckless causing of death as defined in N.J.S.A. 2C:11-2a -- and when he even had the jury return a verdict for conspiracy to commit "criminal homicide," not purposeful intent-to-kill murder. (31T 205-4 to 8; 33T 17-5 to 10; Da 6 to 8)[8]

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mens rea for conspiracy. (25T 67-14 to 19; 26T 158-24 to 159-7) Additionally, the judge clearly expressed to the attorneys, out of the presence of the jury, that it was his view that the jury could find that the defendant had a different expectation -- i.e., mental state -- regarding the conspiracy, intending less than Lewis or Gross. (21T 101-12 to 103-2)

[8] In fact, at times in conversation with counsel, the prosecutor and judge both seemed to exhibit a misunderstanding of the law of conspiracy. For example, the judge agreed with the prosecutor's misstatement that "the theory of conspiracy is that whatever is achieved is what you'[v]e intended" when, obviously, the crime of conspiracy is directly concerned with what the conspirators agreed upon, i.e, "intended," not whether or not they achieved that goal. (21T 103-20 to 23) Moreover, the prosecutor even attempted at a charge conference -- albeit

Proper and comprehensive jury instructions are critical to preserving a defendant's right to due process and a fair trial, even when no objection is lodged. State v. McKinney, 223 N.J. 475, 495 (2015) (reversing for plain error in the robbery instruction). It is "structural error," irremediable by harmless-error analysis, for a jury to deliberate under the wrong burden of proof, Sullivan v. Louisiana, 508 U.S. 275, 277-278 (1993), or the wrong elements. State v. Vick, 117 N.J. 288, 292 (1989).

Indeed, improperly failing to confine the crime of attempted murder to purposeful attempts to kill was the cause of reversals in Rhett, 127 N.J at 3-7; State v. Sette, 259 N.J. Super. 156, 192 (App. Div.), certif. den. 130 N.J. 597 (1992); and State v. Jackmon, 305 N.J. Super. 274, 298 (App. Div. 1997). The result should be no different for a jury instruction on conspiracy to murder that fails to confine the crime to agreements to purposely kill the victim. This jury was not properly instructed on the law in a fundamental and critical way that robs the Court of any ability to trust that the verdict resulted from the jury's

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unsuccessfully -- to expand conspiracy to murder to include what the prosecutor called a conspiracy to commit felony murder, a conspiracy crime that does not exist. (27T 153-16 to 165-19) And it appears from the discussion that ensued on the record (27T 153-16 to 165-19) that the only reason the prosecutor did not get her wish in that regard was because the judge held that felony murder was not pled in the indictment as the goal of the conspiracy, when, in fact, there is no such crime as a conspiracy to commit felony murder, an unintentional crime; a conspiracy to commit felony murder makes no more sense than does an "attempted felony murder," the existence of which was rejected in Darby, 200 N.J. Super. at 331.

unanimous agreement on the correct elements of the crime. Defendant's conspiracy conviction should be reversed.

The only remaining question is the remedy. Obviously, ordinarily, the failure to properly define the elements of a crime in a jury instruction results in a reversal and remand for retrial. See, e.g., Rhett, 127 N.J at 3-7; Sette, 259 N.J. Super. at 192; and Jackmon, 305 N.J. Super. at 298. But there is one narrow exception that instead results in an entry of a judgment of acquittal -- where there is an overall jury verdict that is inconsistent on different counts, and the inconsistency can be explained by the charging error. State v. Grey, 147 N.J. 4, 15-18 (1996).

In Grey, the jury acquitted defendant of the only predicate felony for felony murder, which in that case was aggravated arson, but convicted him of felony murder and of conspiracy to commit aggravated arson – which is not a predicate felony of felony murder. Id. at 5. The defendant complained of an inconsistent verdict (the acquittal for the predicate felony versus the guilty verdict for felony murder) and the Supreme Court held that if there is no explanation for an inconsistent verdict, then there is no remedy for such inconsistency, but if the inconsistency can be explained by an instructional error, the remedy is to reverse the inconsistent guilty verdict and not to remand for retrial, but rather to acquit. Id. at 9-12, 15-18. In Grey, that instructional error was failing to affirmatively inform the jury that conspiracy to commit

aggravated arson was not a predicate felony of felony murder and that if the jurors acquitted of the substantive crime of aggravated arson, they had to acquit of felony murder as well. Id. at 15-18. Thus, Grey's felony-murder verdict, which was inconsistent with his acquittal of the predicate felony, was reversed and that count dismissed. Id.

Here, the inconsistency in the verdict is obvious: defendant was acquitted of knowing/purposeful murder -- even though vicarious coconspiratorial liability, N.J.S.A. 2C:2-6b(4), for murder was charged as a means to a guilty verdict for the substantive crime of murder (31T 211-3 to 216-22) -- but he was convicted of conspiracy to murder! Those verdicts, obviously, are inconsistent and make no sense together. The instructional error discussed herein -- overbroadening the definition of the crime of conspiracy to commit murder -- explains that inconsistency. The jury was improperly allowed to convict for the inchoate crime of conspiracy to murder even if the defendant did not intend a purposeful killing in a case where the jurors very well could have questioned what exactly defendant conspired to do and specifically whether he truly agreed to help purposely kill Harris. Thus, when an inconsistent verdict resulted from a misinstruction, under Grey the remedy for the instructional error is reversal of the conviction and a remand for entry of a judgment of acquittal on that charge. Obviously, if this Court disagrees with the Grey analysis, then the alternative remedy would be reversal and a remand for retrial of the conspiracy count.

POINT II

THE MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED FOR TWO REASONS: (1) THE STOP OF THE DEFENDANT'S RENTAL VEHICLE WAS MADE WITH ONLY A "HUNCH" THAT IT HAD BEEN INVOLVED IN A CRIME, RATHER THAN THE REASONABLE SUSPICION THAT THE CONSTITUTION REQUIRES, AND (2) THE ENSUING DETENTION OF DEFENDANT WENT FAR BEYOND A MERE "STOP" -- IN TERMS OF LOCATION AND TIME -- AND THEREBY BECAME A FULL-BLOWN ARREST WITHOUT PROBABLE CAUSE. (STOP PARTIALLY RAISED BELOW; ARREST FULLY RAISED BELOW; RULING AT DA 4 TO 5; 4T 81-18 TO 87-5)

A motion to suppress the fruits of both the stop of defendant's rental SUV two hours after the shooting and the detention of defendant for a number of hours thereafter was held on various dates, with the judge ultimately concluding that: (1) the stop was supported by reasonable suspicion and (2) the stop did not become an arrest without probable cause when law enforcement transported defendant to another location where he was held for hours and interrogated. (4T 81-18 to 87-5; Da 4 to 5) Because that ruling was wrong on both arguments, and the stop of the vehicle and the arrest of defendant were blatantly unconstitutional in violation of defendant's Fourth Amendment right to be free from unreasonable searches and seizures, his Fourteenth Amendment right to due process, and his right against unreasonable searches and seizures under Article I, paragraph 7 of the state constitution, the order denying suppression and

defendant's resulting conviction should be reversed and the matter remanded for retrial.

The defense argument[9] below was simple: defendant's SUV was stopped without reasonable suspicion that it had been involved in criminal activity, and, once the defendant was detained and transported to police headquarters for interrogation hours later, he was functionally arrested without probable cause. The relevant facts, elicited at the motion hearings, were as follows.

The shooting, according to Sergeant Brandon Kavanaugh, occurred at 11:18 or 11:19 p.m. (2T 104-20 to 25; 2T 143-11 to 13) Detective Miguel Martinez testified that, after the shooting, at about 12:40 a.m., he spoke to Justin McDowell, who lived at the motor lodge next door to Delsea Gardens, and McDowell said he had seen a "dark-colored SUV" that was "like a newer model Chevy Suburban, with four occupants inside, pull into the complex three separate times that night -- between 8 and 8:15 p.m., again around 9 p.m., and

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[9] Defendant's attorney made those arguments in his motion brief (Da 13 to 18) and then, at the argument on the motion to suppress he appeared to abandon the challenge to the stop and only focus on the illegal arrest. (4T 57-19 to 20; 4T 61-24 to 66-7) But the codefendant's attorney continued to assert that the stop of the SUV was unconstitutional (4T 70-12 to 16), and so the judge ruled on both arguments. (4T 81-18 to 87-5) Hence, in an exercise of caution, defendant has labeled the argument on appeal regarding the stop of the SUV as "partially raised below" -- i.e., in defendant's motion brief and the codefendant's oral argument -- but if this Court decides to treat the matter as one of plain error, instead of one that was raised and that the judge fully addressed, which he did, the legal argument is the same: the stop was plainly improperly predicated on a hunch, not information equating to the necessary level of reasonable suspicion.

again at 11:20 p.m. (2T 11-19 to 15-22) Each time, McDowell said, he saw two men exit the SUV in the motor-lodge lot, walk through the hole in the fence to Delsea Gardens, and then return to the SUV, whereupon the SUV would leave the area. (2T 14-2 to 8) The two who got out of the SUV both wore dark clothing and one had reflective material on that clothing. (2T 19-1 to 7; 8/17 32-1 to 2) Martinez testified that Lt. George Chopek was with him when McDowell gave that information to police and that Martinez eventually heard Chopek pass on McDowell's description of the SUV to Sergeant Kavanaugh by phone. (2T 24-11 to 25-21) Martinez did not hear Chopek describe the suspects to Kavanaugh, just the vehicle. (2T 34-5 to 35-19)

Kavanaugh testified that he went to Delsea Gardens "maybe an hour after the incident" was called in, and he observed the victim lying dead in the apartment. (2T 62-8 to 63-14) Because police have remote access to surveillance video from Delsea Gardens, before Kavanaugh headed to the scene he had reviewed "grainy" video of the shooting that he said depicted the victim answering the door of the apartment and a person shooting him and running away. (2T 67-10 to 68-21) However, he was clear that he did not view video of the SUV at that time or any time prior to the later stop of that vehicle. (2T 68-22 to 69-2) At the crime scene, Kavanaugh learned that a "large dark-colored SUV" might have been involved in the incident. (2T 69-17 to 70-23)

Two hours after the shooting, at 1:18 a.m., Kavanaugh testified, he saw a

large, dark SUV -- that ultimately turned out to be defendant's rental Ford Expedition -- "exiting the apartment complex onto South Second Street," heading north, and he followed it. (2T 71-9 to 72-6; 2T 135-12 to 15) However, he did not see from where in the Delsea Gardens complex the SUV had come. (2T 73-6 to 9) Kavanaugh admitted that during the entire time he followed the SUV, he never observed a motor-vehicle infraction committed by the driver. (2T 77-16 to 19) Kavanaugh saw the SUV park and idle near Larry's Bar and the front-seat passenger exited the vehicle, went inside the bar, and came out a short time later, whereupon he got back into the SUV and that vehicle drove back onto northbound Second Street with Kavanaugh still following. (2T 74-8 to 76-20) Kavanaugh did not notice anything about the passenger's clothing, height, or facial appearance. (2T 75-16 to 22) He only knew it was a black man that he saw, and he admitted that the man did not look like anyone he had previously seen on a surveillance video. (2T 76-2 to 4; 2T 124-3 to 6) He also admitted that he saw "[n]othing out of the ordinary" when the man went into the bar and then returned to the SUV. (2T 112-3 to 7) Prior to the SUV's stop at Larry's, Kavanaugh had called in the plate number and learned that vehicle was a rental. (2T 76-22 to 24)

Kavanaugh testified that the SUV then passed East Main Street and turned onto North Broad and then made a left onto Powell Street two blocks later. (2T 76-22 to 77-9) While Kavanaugh was still on North Second Street, between

Main and Broad, he got a call from Chopek, who updated the description of the vehicle that McDowell had described to "a large black SUV, somewhat shiny, Ford Expedition or Chevy Suburban style." (2T 77-24 to 78-6; 2T 71-2 to 4) When Kavanaugh told Chopek that he was behind a vehicle that fit that very general description, he testified, "we determined that maybe I should stop it and find out who the occupants were inside of it." (2T 78-9 to 79-6) He then stopped the SUV on East Powell Street. (2T 79-14 to 16) Kavanaugh agreed with the following summary of what he knew when he stopped the SUV: "You know it's a dark SUV. You know that the passenger isn't wearing clothing that's consistent with anything that you saw on the video when you left. You know there hasn't been any traffic infraction. You've been following the car for ten to fifteen minutes. . . . And that's all you knew." (2T 127-10 to 20)

Kavanaugh testified that he had initially followed the SUV on "more of a hunch that, hey let me see if I can identify the people in the vehicle so in case later on they say, you know, these occupants I saw in the vehicle were involved. I can say well, I saw them in an SUV pulling out of the complex." (2T 111-16 to 21) (emphasis added) He repeated his admission that he followed the SUV "on a hunch." (2T 121-8 to 10) Kavanaugh he also testified that he initially followed the SUV because it "was a newer, you know 50 to 60,000 dollar SUV pulling out of low-income housing projects at 1:30 in the morning," and "typically you don't see that." (2T 78-21 to 79-1) It "caught [his] attention"

because "it was just a really nice vehicle for that area" and there was no other traffic in the area. (2T 108-15 to 19) He also called Delsea Gardens generally a "high-crime area." (2T 109-6 to 11)

The stop itself was uneventful, but lengthy. Kavanaugh testified that, initially, the passenger, Deontray Gross, exited the vehicle, but returned when instructed to do so. (2T 80-9 to 18) Kavanaugh also called for backup, which arrived. (2T 81-11 to 12) Both men then exited the SUV when ordered to do so, and frisks of both revealed no weapons, but a warrant check uncovered an outstanding warrant for Gross, so he was handcuffed and formally arrested, while defendant had no outstanding warrant. (2T 82-5 to 24; 2T 139-5 to 13) Defendant provided Kavanaugh with all necessary documentation for himself and the rental vehicle, according to Kavanaugh. (2T 130-13 to 18) The stop took place at 1:34 a.m., according to Kavanaugh, and defendant was "turned over to the detective bureau" for transport to police headquarters and placed into a squad car, but not handcuffed, at 1:51 a.m. (2T 21 to 87-19; 2T 90-19 to 92-4) But that car did not actually leave the scene to head to the police department until sometime after 2:26 a.m.; Kavanaugh agreed that it was "at least an hour" between the initial stop and defendant's transport to headquarters. (2T 93-17 to 94-6) He also admitted that he waited at the scene of the stop for 30 to 45 minutes for detectives to show up and give him any additional information regarding whether he had stopped the right people and, when they arrived, the detectives

had no such information. (2T 137-24 to 138-5)

Chopek testified that in his opinion defendant was "in custody" as of the time he was ordered into the car for transport to headquarters, and he took responsibility for that decision, but he also claimed, paradoxically, that defendant was not "under arrest." (4T 32-14 to 34-6) The goal, according to Chopek, was to take defendant back to the station, "Mirandize him," which they did, and get a statement from him, which they also did. (4T 43-17 to 20) That was a conscious choice, Chopek admitted, to transport defendant to the station for such questioning, rather than do so at the scene. (4T 43-11 to 24) According to Detective Ricardo Ramos, who conducted the interrogation, defendant was not read his rights until 3:56 a.m., after which he was interrogated. (2T 166-18 to 21) Ramos claimed not to know whether defendant was under arrest at the time, but he agreed that defendant was not free to leave when he was brought in, and that he was charged after the interview, which Chopek testified was about 5 a.m. (3T 46-25 to 47-1; 3T 49-2 to 25; 3T 64-16 to 65-23; 4T 44-14 to 19)

Faced with all of this evidence, the judge made the following legal conclusions. First, he concluded that the stop of the SUV two hours after the shooting was reasonable because: police "had a description of the vehicle" from Justin McDowell (4T 81-18), which the judge said was of "a large Suburban type SUV, newer and specifically shiny" (4T 80-15 to 19) and that generic description "matched" the rental vehicle (4T 81-24); Delsea Gardens "is a high-

crime area" (4T 81-19 to 20); and it was after 1 a.m., not "mid-day." (4T 20 to 24) As for the claim that the stop became an arrest when defendant was kept at the scene for an hour, then transported to headquarters and interrogated later, the judge said that: "there was sufficient reasonable suspicion that [defendant] needed to be questioned"; he concluded that it was "an evolving situation"; and there is "not a bright line" between the 1:34 a.m. stop and hours later at about 4 a.m. when defendant was interrogated "where you [can] say at this point he's arrested." (4T 83-13 to 84-11) The judge agreed however that "it's clear" that defendant would not have thought he was free to leave during that time. (4T 61-13 to 14) Ultimately, the judge refused to find a search-and-seizure -- i.e., Fourth Amendment or Article I, paragraph 7 -- violation and did not suppress anything from the car or from the statement as a "fruit" of such a violation.[10] (4T 86-19 to 87-5) It is that ruling that is under scrutiny in this point.

Under the Fourth Amendment of the United States Constitution and Article I, paragraph 7 of the New Jersey Constitution, the State bears the burden of justifying a warrantless search or seizure. State v. Nyema, 249 N.J. 509, 527 (2022); State v. Bolte, 115 N.J. 579, 585 (1989). In Nyema, the Court reiterated the age-old rule from Terry v. Ohio, 392 U.S. 1 (1968), that for a stop of a person

[10] However, in a Fifth Amendment ruling that is not challenged here, the judge admitted only the portion of defendant's statement that is set forth in the Statement of Facts, supra, because, after that portion of the statement, defendant asserted his right to silence. (4T 86-15 to 19)

to be constitutionally valid, the officer must possess a reasonable, articulable suspicion that the suspect is engaged in criminal activity. Nyema, 249 N.J. at 527; see also State v. Arthur, 149 N.J. 1, 8 (1997) ("There must be 'some objective manifestation that the suspect was or is involved in criminal activity'"), quoting State v. Thomas, 110 N.J. 673, 678 (1988).

As noted, Sgt. Kavanaugh testified that he followed the SUV on a mere "hunch" that, because it fit the general large/new/dark description given by McDowell, it might be the same SUV, even though it was, at that point, two hours after the shooting. He also focused on the fact that it was a moderately expensive SUV in a poorer/"high crime" area of town. To that point, Kavanaugh had not done anything wrong. It is a stop of a vehicle -- no matter how brief -- not merely following it, that constitutes a seizure of that vehicle that must be constitutionally justified. State v. Scriven, 226 N.J. 20, 33 (2016). But the only additional piece of information that Kavanaugh learned after deciding to follow the SUV on that "hunch" was from Chopek: that the dark, large SUV that McDowell saw two hours earlier was a "somewhat shiny, Ford Expedition or Chevy Suburban style" SUV. That was hardly much help; a simple internet search will tell a person that there are a lot of newer Ford Expeditions on the road: 19,911 sold nationwide in the fourth quarter of 2024 alone.

Thus, when, after fifteen or so minutes of following the SUV on a "hunch" and not observing a single traffic violation, the only additional piece of

information that Kavanaugh learned was that the SUV McDowell saw two hours earlier was in the "style" of a couple of very popular American SUVs, he was still just operating on a "hunch" when he stopped that vehicle, and a "hunch" is not good enough. Nyema, 249 N.J. at 535. He had nothing close to a "reasonable suspicion" that that SUV was the same one McDowell had seen at the time of the shooting, or that it was involved in criminal activity. It was two hours later!

In Nyema, the Court rejected the State's claim of reasonable suspicion for a stop when, just minutes after the armed robbery of a 7-Eleven by two black males, an officer stopped a car with three black males in it just 0.75 miles from the store because: they were black males, nearby the store, just minutes after the robbery, and did not react negatively (or at all) -- as the occupants of other cars had -- when the officer shone a bright spotlight into their car as it initially drove past him. 249 N.J. at 514-515, 531-535. Similarly, in State v. Shaw, 213 N.J. 398, 401 (2012), the Court rejected the notion that the police had reasonable suspicion to stop a black man outside an apartment building where a fugitive lived when the only thing police knew about that defendant and the fugitive were that they were both black men, and when the defendant quickly split up with his companion and walked away when he saw police approaching. Likewise, in State v. Caldwell, 158 N.J. 452, 460 (1999), where a similar race-based description was all the police had to justify a stop, the Court cautioned against allowing the police to "conduct wide-ranging seizures based on vague general

descriptions."

Here, while Kavanaugh avoided the noxious connotations of using a race-based description as justification for the stop, he nevertheless had no more "reasonable suspicion" to justify his stop than did the police in Nyema, Shaw, and Caldwell. He was looking for a dark SUV and saw one, two hours after the shooting -- not minutes later. Even he admitted that he followed the SUV on a mere "hunch." What, this Court should ask itself, additional information did he learn after proceeding on that "hunch?" Not much. All he learned before stopping the SUV was that the one he was looking for might be a dark, shiny one of a couple of very popular American SUVs, so he stopped one of those. As in Nyema, the fact that his hunch paid off -- and at least the passenger was one of the people he was looking for -- does not retroactively justify stopping a motor vehicle based only on a hunch. 249 N.J. at 535. The Court should order suppression of all of the fruits of that stop, which plainly were used by the State to prosecute and convict defendant.[11]

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[11] So often the State will lament: "But this was a serious case, what could the officer have done if not conduct this stop?" The answer here is easy: Kavanaugh's "hunch" was enough to follow the vehicle to its eventual destination and then approach defendant to see if he would answer questions voluntarily: a so-called "field inquiry." But Kavanaugh did not have enough to information to constitute reasonable suspicion in order to conduct a formal stop as was done here. See State v. Rodriguez, 172 N.J. 117, 125-129 (2002) (distinguishing between a mere field inquiry, which can always be undertaken,

But as noted, the errors did not stop there. The stop, once undertaken, so plainly became an arrest conducted without probable cause, that suppression of its fruits should have been ordered for that reason too. The United States Supreme Court has held what was already the law in New Jersey: that a Terry stop may not be extended beyond the investigatory purpose related to the stop itself. Rodriguez v. United States, 575 U.S. 348, 354-355 (2015); see also State v. Coles, 218 N.J. 322, 346-348 (2014) (police could not continue to detain defendant past the time of an unsuccessful show-up identification, after which his relative confirmed his own identity); State v. Dickey, 152 N.J. 468, 478-479 (1997) (extending detention past the purpose of the stop was unconstitutional); State v. Shaw, 237 N.J. 588, 612-614 (2019) (same). Indeed, Rodriguez v. U.S. is very strict on the issue, finding unconstitutional error in a delay of mere minutes after the purpose of the detention had been exceeded and a warrant check had turned up negative, unless independent reasonable suspicion of another crime existed to justify the delay. 575 U.S. at 354-358.

Here, there is no doubt that the defendant, once transported to police

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with no restraint on the person being inquired of, and a Terry stop, which requires particularized suspicion that the person actually is doing, or has done, something illegal). And no, there is no guarantee that such a field inquiry would pay off, but as Justice Scalia noted in Arizona v. Hicks, 480 U.S. 321, 329 (1987), when the constitution restricts the actions of police officers, sometimes they will be left without an option to stop (or frisk or search, whatever the case may be), "in order to protect the privacy of us all."

headquarters and placed in an interrogation room for hours, was not free to leave and was under arrest, not merely still the subject of a Terry stop. The judge said so; Detective Ramos said so. Indeed, what happened here nearly mirrors what occurred in Dunaway v. New York, 442 U.S. 200, 203, 212 (1979), where suppression was ordered when a murder suspect was picked up without probable cause and transported to a local police station for interrogation. The prosecution argued that what occurred was merely a logical extension of a Terry stop, but the Court held it was an arrest, and trained its focus on a number of facts, all present here: "Petitioner was not questioned briefly where he was found. Instead, he was taken . . . to a police car, transported to a police station, and placed in an interrogation room. He was never informed that he was 'free to go'; indeed, he would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody." Id. at 212. Thus, the fruits of the illegal arrest in Dunaway were suppressed. Id.

Similarly, in Shaw, citing Dickey and Coles, the Court listed factors to be considered in determining whether a stop has become an arrest: "unnecessary delays, handcuffing the suspect, confining the suspect in a police car, transporting the suspect, isolating the suspect, and the degree of fear and humiliation engendered by the police conduct." 237 N.J. at 612-613. Of those, only the lack of handcuffing weighs in the State's favor. Defendant was stopped, detained for an hour at the scene, and, rather than being asked questions at the

scene, transported -- for reasons that Kavanaugh could not explain ("[I]t wasn't my case to decide" that issue) (2T 139-17 to 140-17) -- to police headquarters, where he was confined to an interrogation room for an interrogation that did not begin until 2.5 hours after the initial stop. There is no dispute that he could not leave that room or the police station. As Shaw notes, "[o]ur Constitution requires officers to pursue the least intrusive means when they conduct an extended investigatory detention." 237 N.J. at 613 (emphasis added). These were not the "least-intrusive means" to ask defendant some questions. Short of handcuffing him as well, these were the most intrusive means, and unduly lengthy at that. He was unconstitutionally under arrest without probable cause. As in Dunaway and Shaw, the fruits of that unconstitutional arrest, which were used to convict defendant of conspiracy to murder, should be suppressed, his conviction reversed, and the matter remanded for retrial.

POINT III

THE SENTENCE IMPOSED IS MANIFESTLY EXCESSIVE AND UNCONSTITUTIONAL. (RULINGS AT DA 9 TO 12; 34T 13-11 TO 21; 34T 69-15 TO 73-12; 34T 77-19; 34T 79-15 TO 18; 34T 79-23 TO 80-2; 34T 80-3 TO 8)

Judge D'Arrigo sentenced defendant on first-degree conspiracy to murder to a 36-year/85%-without-parole discretionary extended term as a persistent offender. (Da 9 to 12) In doing so, he found two of the defendant's prior convictions -- robbery in 2005 and a drug conviction in 2017 -- to qualify defendant for an extended term under N.J.S.A. 2C:44-3a. (34T 13-11 to 21) He then announced that the sentencing range that he was considering was from 20 years to life, and that the midpoint of that range was 42.5 years. (34T 79-15 to 18; 34T 79-23 to 80-2) Finally, after considering the same prior convictions that triggered the extended term, the judge found aggravating factors three (chance of recidivism), six (prior record), and nine (need for deterrence), and no mitigating factors, and imposed the 36-year/85% extended term. (34T 69-15 to 73-12; 34T 77-19; 34T 80-3 to 8)

Three specific errors were committed in sentencing defendant, and each of them warrants a remand for resentencing. First, in violation of the Sixth Amendment, there was no jury finding of the statutory predicates for a discretionary extended term. Rather, Judge D'Arrigo made those findings. As

held by this Court in State v. Carlton, 480 N.J. Super. 311, 328-329 (App. Div. 2024) -- applying the decision of the United States Supreme Court, in Erlinger v. United States, 602 U.S. 821 (2024) -- a jury, not a judge, must find the five prerequisites to imposition of a discretionary extended term: (1) a defendant at least 21 years old at the commission of the present offense; (2) previous convictions of predicate crimes on two separate occasions; (3) commission of those predicate crimes at different times; (4) commission of those crimes when the defendant was at least 18; and (5) the defendant's release from confinement for those prior crimes within ten years of the commission of the present crime. N.J.S.A. 2C:44-3a. Obviously, a jury did not make those findings here, and, thus, when Judge D'Arrigo did so instead (34T 13-11 to 21), defendant's Sixth Amendment right to a jury trial and his Fourteenth Amendment right to due process, along with his corresponding state-constitutional rights were violated, an error that Carlton held is not subject to harmless-error analysis under these circumstances, 480 N.J. Super. at 335-339, and the matter must be remanded for resentencing as a result.

Secondly, the judge plainly misstated the applicable sentencing range when he declared it to be "between twenty years and life." (34T 79-15 to 18) When a judge determines that a defendant is extended-term eligible, the range of possible sentences is from the bottom of the ordinary term, in this case ten years for first-degree conspiracy, to the top of the extended term, in this case

life in prison. State v. Pierce, 188 N.J. 155, 169 (2006); see also State v. Tillery, 238 N.J. 293, 324 (2019) (same). Thus, immediately the judge was off on the wrong track, inappropriately believing that his discretion was overly limited and that the range of available sentences was higher than it really was: 20 years to life, instead of ten years to life. Any sentencing decision made thereafter was tainted by that profound misunderstanding -- particularly where defense counsel was requesting a ten-year sentence (34T 33-1 to 2), and the judge was plainly miscalculating the "midpoint" between the lowest and highest available sentences as a result of that misunderstanding (34T 79-23 to 80-2) -- and, thus, resentencing is warranted for this error as well.

Finally, judges must be careful when assessing the aggravating circumstances that are used to set the length of an extended term not to double-count the same prior offenses that triggered the imposition of that term. State v. Dunbar, 108 N.J. 80, 89-92 (1987). A look at Judge D'Arrigo's statement of reasons reveals a complete commingling of the two prior conviction(s) that triggered the imposition of the extended term with the prior offenses considered in support of the three aggravating factors (likelihood of recidivism, prior record, and need to deter) that were found in setting the length of that term. (34T 69-15 to 71-14) That clear Dunbar violation also warrants a remand for resentencing.

CONCLUSION

For all of the reasons in Points I and II, defendant's convictions and the order denying suppression should be reversed and the matter remanded either for retrial or for entry of a judgment of acquittal (for the reasons argued in Point I). Alternatively for the reasons in Point III, the matter should be remanded for resentencing.

Respectfully submitted,

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Attorney for Defendant-Appellant

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Designated Counsel
Attorney I.D. No. 034601986

Date: June 10, 2025

Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-1006-23
INDICTMENT NO. 20-1-103

August 25, 2025

STATE OF NEW JERSEY, Plaintiff-Respondent v. **GREGORY A. COOMBS,** Defendant-Appellant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION CUMBERLAND COUNTY INDICTMENT NO. 20-1-103 CRIMINAL ACTION On appeal form a judgment of conviction of the Superior Court of New Jersey, Law Div., Cumberland County Sat Below: Hon. Cristen P. D'Arrigo, J.S.C.

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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DEFENDANT IS CONFINED

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PROCEDURAL HISTORY

On or about January 29, 2020, a Cumberland County grand jury returned an indictment against defendant, charging him and first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2) (count one), first-degree conspiracy to commit murder, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:11-3(a)(1) (count two), and second-degree burglary, N.J.S.A. 2C:18-2(a)(1) (count four). (Da1-3).[1] The indictment also charged co-defendants Clive Lewis and Deontray Gross with additional counts not relevant here.

[1] "Da" refers to defendant's appendix
"Db" refers to defendant's brief.
"PSR" refers to the pre-sentence report.
Abbreviations for transcript are as set forth in defendant's brief.

Prior to trial, defendant filed a motion to suppress evidence obtained as a result of a motor vehicle stop. (Da4). The Honorable Cristen P. D'Arrigo, J.S.C. denied this motion on September 21, 2021. (Da4).

Defendant and Lewis were tried on various days between January and March 2023. On March 10, 2023, defendant was convicted of conspiracy to commit murder and acquitted of the remaining charges. (Da6-8). On September 11, 2023, defendant was sentenced to a discretionary extended term of 36 years subject to NERA. (Da9). This appeal ensued.

COUNTERSTATEMENT OF FACTS

I. FACTS ADDUCED AT TRIAL

a. Shante Brooks' testimony

Shante Brooks testified that the victim, Derrick Harris, was her boyfriend and had a child in common with her. (11T146). In November 2019, she resided at an apartment complex named Delsea Gardens with Harris and their child. (11T147). On November 6, 2019, she and Harris were resting when they heard a knock at about 8:00 pm. (11T149). They decided not to answer the knock. (11T156). At about 11:00 pm, they heard another knock, and this time Harris went to open the door. (11T149:22, 11T160). Meanwhile, Brooks went to the window of the floor above

and peeked out of it. (11T160). From there she saw an individual with penny-wise foamposite Nike sneakers. (11T160). As soon as the door was opened, she heard many shots. (11T161). She closed the window, came downstairs and found Harris on the floor. (11T162-163). She then went back upstairs and contacter her aunt, asking her to call 911. (11T163).

b. Deontray Gross' testimony

Deontray Gross testified that he was Harris' best friend. (25T9:24). He had known him since the age of seven or eight. (25T10:1). In 2018, he and Harris "broke[] into somewhere" and stole $100,000 from Chuck, a friend of Harris'. (25T25-26). At the time of the murder, Gross was living at a complex called Vineland Village, and Harris was living with Brooks at Delsea Gardens. (25T19; 21:21-25). Gross was not on speaking terms with Brooks; however, he had access to her and Harris' wifi. (25T22:21-23:6).

Gross was a friend of Lewis and had known him since childhood. (25T30; 35-36). Lewis was living with his girlfriend in Vineland but stayed with defendant "for a while" in Seabrook because he had an argument with the girlfriend. (25T34:23-35:1; 45:23-24). Gross did not meet defendant until the day of the murder. (25T29:24). On November 6, 2019, Gross' cousin, who lived in Seabrook, had just been released from jail, and Gross bought a bottle of alcohol to celebrate with his

cousin. (25T39-40). When he arrived at his cousin's home, the cousin was not there, so he contacted Lewis and asked him if he wanted to drink. (25T40:25). Lewis then directed Gross to defendant's house, which was nearby. (25T42; 44:8-9). Gross was driving a grey BMW at the time; he had a black BMW too, but that car was in need of service. (25T43).

He arrived at defendant's house at about 7 pm. (25T46:1-4). He then drank with defendant and Lewis, until defendant "took a shot . . . and was like, so this the one that hit the lick." (25T46). "[T]he one that hit the lick" means the one responsible for the theft. (25T48:14-16). Defendant's statement made Gross uncomfortable because Chuck had a $50,000 bounty on Gross and Harris. (25T49). There were two guns on the table at the time. (25T47:16-19; 53:7-8). Feeling uneasy, Gross stepped outside to smoke a cigarette and contemplate a plan to get away. (25T53-54). While he was outside, defendant and Lewis joined him. (25T53). Lewis was carrying one of the two guns from the table. (25T54:25). Gross believed defendant was also carrying a gun because "he would touch his waist" and fix his waist. (25T54:15-18). Defendant stated that Gross was to do what Lewis said, and Lewis told Gross to enter defendant's car – a black SUV. (25T46:24-47:8; 54:6-9; 56:7-8). Lewis was pointing the gun at Gross when he said this. (25T55:16-17).

Per Lewis' directive, Gross sat in the front passenger seat of the SUV, and Lewis sat behind him. Defendant was the driver. (25T56). Lewis told defendant to

drive to Gross' house, and defendant had no difficulty doing so even though, to Gross' knowledge, he had never been to his house. (25T57). While in the car, defendant and Lewis told Gross that his shoes were too bright and had to be changed, and that no harm would come to him if he complied with their wishes. (25T58). They explained that they wanted to take Gross to Harris' home and have him knock on his door, so that Harris would open it. (25T58, 60). Gross believed that defendant and Lewis intended to rob Harris. (25T60).

According to the surveillance images retrieved from Vineland Village, the SUV arrived at 8:32 pm and left at 8:42 pm. (25T64-65). While inside his house, Gross changed his shoes and found some gloves and drugs to bring back to the car. (25T62). The gloves[2] were intended to help avoid detection, and the drugs were to appease Gross and Lewis so they would not go inside to rob him and hurt his girlfriend and children in the process. (25T62, 66). After the clothes change, Gross wore green Foamposites, and Lewis wore purple Foamposites. (25T72)

When he returned to the SUV, Gross gave the drugs to defendant, and defendant took it. (25T72). They then headed to Delsea Gardens. Defendant's role once they got there was to serve as a lookout, while Lewis and Gross went to Harris'

[2] On redirect, Gross testified that Lewis had instructed him to bring out gloves. (26T152).

door. (25T69). Defendant actively participated in the conversation while this plan was being discussed in car. (25T69).

The car ultimately stopped at Milleville Lodge rather than Delsea Gardens. (25T75-76). The two complexes were separated by a fence with a hole, which Cleve and Gross went through to reach Harris' apartment. (25T76). They arrived at the apartment at 9:04 pm, per security footage. (25T77). Lewis was wearing gloves and holding a gun. (25T78). Although Gross was supposed to knock, he merely showed Lewis Harris' home. (25T79). No one responded, and the two men returned to the car through the hole in the fence. (25T79-80).

Defendant, Lewis, and Gross then headed to the Holly Berry complex, which was about a mile from Delsea Gardens. (25T90). Harris was known to frequent that complex, where Brooks' sister lived. (25T91-92). Gross was supposed to point out Brooks' sister's home, but seeing that that home had lights on, he deliberately pointed to a different home, where the lights were off. (25T90-92).

The group returned to Delsea Gardens to obtain weed from Gross' cousin. (25T92-93). Gross went to his cousin's house and asked for weed, but was concerned that if he came back with weed, he might be robbed. (25T93). So he left before his cousin could give the weed to him. (25T93).

After he returned to the car, the group went to Wawa, possibly to get gas, but Gross did not remember what they did there for sure. (25T98). They also pulled in front of "a house" where a white truck was parked. (25T95). Defendant told Gross to get out of the car. (25T95:8). The area was dark and Gross believed defendant was about to kill him. (25T95). However, that did not happen. Instead, defendant asked if Gross knew who the white truck belonged to. (25T95:10-16). Gross stated, "I don't know," even though he recognized the truck as belonging to Chuck. (25T95:17-23). That answer made defendant angry. (25T107:18). After this conversation, the two men returned to the car. Gross saw that Lewis had taken the front seat, so he sat in the back seat. (25T96:1-2).

The car then returned to Millville Lodge. (25T102:20). As with last time, both Lewis and Gross went through the hole and headed to Harris' home. (25T103). Gross knocked on the door as did Lewis. (25T104). Lewis had a gun and was wearing gloves. (25T113). Seeing that the apartment was dark, Gross walked away, while Lewis stayed behind. (25T104). Gross then heard gunshots and started running. (25T104-105). Lewis also ran and both men went through the hole to return to the car. (25T106). Per camera footage this incident occurred at approximately 11:20 pm. (25T112).

Once Lewis and Gross entered the car, defendant drove to Seabrook to drop Lewis off. (25T113). On the way, Lewis stated "I am going to show you how to get

money in Jersey" and discussed splitting the $50,000 with Coombs. (25T117). He also admitted to having shot Harris. (25T117:22-24). His gun was empty with the slide "all the way back." (25T118:18-19). He was still wearing gloves, and defendant told him to take them off. (25T121). He and defendant then argued about the gloves, and Lewis eventually took them off. (25T120-121). Once they arrived at Seabrook, Lewis tossed his gun to Gross. (25T113; 122). Gross exited the truck and attempted to go to his BWM, but he had forgotten his key in the black SUV. (25T121-22). Defendant ordered him to return to the truck and stated that he would take him home. (25T122-124). Gross was supposed to come back to get his car the next day. (25T124). Lewis resumed possession of his gun and walked into the house, saying he had to go to work the next day. (25T113; 122-123).

Defendant next drove Gross back to his home. (25T124). On the way, Gross received a call from an acquaintance who informed him that Harris had been shot. (25T125). Although Lewis had admitted to shooting Harris earlier, Gross continued to hope that Harris was ok. (25T129). Once they reached Gross' home, defendant returned the drugs Gross had given him earlier. (25T128). Gross wanted to go to Harris' home, and defendant did not let him go alone. (25T129). So after Gross changed his clothes, defendant took him back to Delsea Gardens. (25T133). However, once they got there, defendant saw that police had gathered at the scene and decided to leave. (25T134). As they left, defendant noticed a police cruiser

following them. (25T134). Defendant then drove to Larry's Bar, a liquor store, and told Gross to get out to "grab something," possibly to buy time or to see if the cruiser would continue to follow. (25T134). Gross went inside and got some beer. (25T136:7). Surveillance video shows that this occurred at 1:20 am on November 7, 2019. (25T136).

The cruiser continued to follow after the stop at Larry's Bar. (25T139). While they were driving, defendant instructed Gross to say nothing to the police. (25T141). At some point, Gross asked to get out. (25T139). Defendant stopped, and Gross got out, but the police told him in to return to the car. (25T139). Both were later arrested. (25T139). Gross did not speak with police that night because Lewis was still on the lose and he was fearful that Lewis could hurt his family if he did speak. (25T142-143).

c. Other evidence adduced at trial

Defendant's car was a rental black Ford Expedition. (14T141:13; 14T159). Police found numerous items belonging to defendant in this vehicle, such as driver's license, various cards, and the rental agreement on which defendant signed as the authorized driver. (14T144-159). Also found a discolored latex glove in the front side passenger seat door pocket. (14T151; 15T26; 19T39, 86). The glove tested positive for blood and Lewis' DNA. (14T151; 15T26).

When interviewed, defendant told the police that his car was a rental, and that no one had used it but him. (18T15-16). He admitted that he had gone to Delsea Gardens, and when asked who he had visited there, he said, "I don't know. This dude. I don't know nobody else there." (18T19:2-8). By "this dude," he was referring to Gross. When asked if he stopped at an apartment in the complex, defendant claimed not to know. (18T19)

While in jail, defendant reached out to Lewis multiple times. (23T13-15). Extensive evidence was presented to show that Lewis was staying with defendant. This includes Lewis' subscriber information indicating that his billing address was defendant's address (18T137) and the testimony of defendant's paramour that Lewis' room was the basement in defendant's home. (22T86-87). On November 4, 2019, Lewis advised defendant via Facebook that he had a new "toy," and defendant responded "I bet." (23T100). The term "toy" means "gun." (26T150).

Surveillance at Gross' apartment captured him wearing a jacket with a reflexive stripe at 3:58:50 pm on November 16, 2019. (18T24-25). This was also the jacket that he wore to Delsea Gardens, as reflected by surveillance at that complex. (18T92). Surveillance videos from Wawa, Seabrook, and Larry's Bar, as well as Gross' phone records and information extracted from the rental car's infotainment system, were also admitted into evidence to corroborate Gross' account. The router

at Harris' home showed that Gross' cellphone connected to it at the time of the incident. (16T133)

II. SUPPRESSION HEARING

a. Detective Miguel Martinez

Detective Miguel Martinez testified that on the night of the murder, he was called to assist with the investigation. (2T10). He arrived on scene at approximately 12:40 am and spoke with a witness named Justin McDowell. (2T11-12). McDowell, who resided at Millville Lodge, reported that he had seen a dark color SUV three times that night, the first time at 8:15 pm, the second at 9 pm, and the last at 11:20 pm. (2T14-15). He described the SUV as a "newer model" Chevy Suburban and stated that it was occupied by four individuals. (2T15). He also saw two subjects wearing dark clothing exit the vehicle, walk towards the fence between Millville Lodge and Delsea Gardens, "then return and leave, and then come back again." (2T14, 19). One of these subjects was with "reflective wear around the jacket or shirt."

Lieutenant George Chopek, who was with Martinez, relayed the information from McDowell to Sergeant Brandon Kavanagh. (2T25).

b. Seargent Brandon Kavanagh

The police department had remote access to Delsea Gardens' security footage, and when Sergeant Kavanagh reviewed it, he saw a person gesturing as if shooting in front of Harris' apartment. (2T67:17). He also saw another individual who did not stay at the door that long. (2T104:2-3). This individual was wearing a top with reflective strips. (2T104:9). The image quality was "not clear" and would not enable the viewer to "100% ID a person's face." (2T68). After watching the footage, Kavanagh came to the crime scene and took part in processing evidence. (2T64:16-20). As he was leaving Delsea Gardens at about 1:18 a.m., he saw a newer Ford Expedition exiting the same complex. (2T71-72). He could not tell how many occupants there were in this vehicle. (2T72). Ford Expeditions closely resemble Chevy Suburban, and there were not "a lot of cars on the road at [the] time." (2T72). No other car matched McDowell's description. (2T72-73).

Kavanagh decided to follow the vehicle. (2T73). At first, the vehicle was travelling at a high rate of speed, but it slowed down once Kavanagh closed the gap. (2T73:22-25; 2T77:19-21). Kavanagh noticed that the vehicle had an out-of-state license plate.[3] At about one mile from Delsea Gardens, the vehicle stopped at Larry's Bar, and the front passenger got out and entered the store. (2T74-76). After a few minutes, the passenger returned and the vehicle resumed traveling, with Kavanagh still following. (2T72-73). When Chopek called Kavanagh on the phone and

[3] Various described as a Pennsylvania plate and a Texas tag. (2T74, 130-31)

informed him that the suspect vehicle was a "large black SUV, somewhat shiny," Kavanagh responded that the vehicle in front of him matched that description to the T. (2T78). He and Chopek decided to stop the vehicle. (2T78). The reason for the stop was as follows:

> "Given the fact that it was –- I'm familiar with vehicles and pricings and stuff like that, so given the fact that it was a newer, you know, 50 to 60,000 dollar SUV pulling out of a low income housing projects at 1:30 in the morning, typically you don't see that. That's originally why I followed it, plus the fact that it was a large dark colored SUV. And then after I talked to Lieutenant Chopek and he informed me that it was shiny, or somewhat clean SUV, we determined that maybe I should stop it and find out who the occupants were inside of it."
>
> [2T78-79]

Before Kavanagh ordered it to stop the vehicle stopped on its own in the middle of a lane, and the front passenger existed and began to walk away. (2T80, 96). The front passenger returned and entered the car when Kavanagh directed him to do so. (2T80). There were two occupants in the vehicle. (2T81). The driver was defendant, and the passenger was Gross. (2T80-81). The investigatory stop began at 1:34 am. (2T93:21). Kavanagh conducted a warrant check on both occupants and found an outstanding warrant for Gross. (2T82). Gross was arrested. (2T82). Defendant was turned over to the detective bureau without being handcuffed. (2T81-82;p 90:21-22).

c. Detective Ricardo Ramos

Detective Ricardo Ramos arrived at the crime scene sometime before midnight. (2T149:17). He spoke to Brooks briefly, then transported both her and Rashon Rogers, her friend who was at the apartment, to the police station for a formal interview. (2T150-151). Ramos could not recall when he began to interview Brooks, but was aware that he interviewed Rogers first, and Rogers' interview started at 1:24 a.m. (2T156). Brooks informed Ramos that Gross was a friend of the victim. (2T153). Ramos relayed this information to other officers and learned from them that Gross had been detained. (2T156). Ramos then attempted to interview Gross, but Gross invoked his right to an attorney. (2T156) This last interview occurred at 3:26 a.m. (2T161).

Ramos next interviewed defendant. (2T161). He started by giving the Miranda warning. When he asked if defendant understood, defendant stated "I been arrested before. I know – I'm trying to figure out what the fuck going on." (2T181). After completing the paperwork, defendant stated "I want to know . . . . I already signed my papers and I don't know what the fuck going on." (2T183). When officers explained to him that his car had matched the description, defendant complained that in the past, police had claimed his car matched a description because they wanted to search it, but that they were going too far this time. (2T184). Defendant then stated that he was the only one to drive the black SUV, and that he had been travelling around in it all day. (2T169). When asked if he had been "in and out of [Delsea

Gardens] all day," defendant stated "I don't know. I don't know. Fuck that. I don't know." (2T189). He then refused to answer additional questions. (2T190:2-3).[4]

d. Lieutenant George Chopek

After asking Kavanaugh to pull the vehicle over, Chopek joined him at the stop. (4T17). He arrived between 1:30 am and 2:00 am. (4T22:11-13). While on scene, he reviewed another channel of Delsea Gardens' surveillance, which showed a black SUV entering and leaving the complex right before the homocide. (4T21:11-14; 54:7-14). "It was pretty clear" to him that that SUV and the stopped SUV were most likely one and the same. (4T33:9-11). As he stood by the stopped vehicle, he was able to observe some "rubber gloves" in the passenger side door. (4T22:24-23:11). He felt that the two occupants matched the individuals he saw on surveillance in terms of size, height, and build. (4T24:1-4). The vehicle was eventually impounded and searched pursuant to a warrant. (4T24).

e. The trial judge's decision

Judge D'Arrigo found that the stop of the black SUV was supported by reasonable suspicion – a finding defense counsel had explicitly encouraged. (4T57:19-58:4; 81:13-15). The judge further found that "the decision to bring

[4] The judge suppressed the portion of the interview that followed this statement.

[defendant] back to the station for a formal interview [did not] constitute[] him being arrested," as law enforcements needed a formal statement they could not obtain at the roadside. (4T83:10-13; 84:24-85:3). Once the SUV was stopped, the judge explained, police found the gloves, and subsequent interviews with Brooks revealed that Gross was connected to the victim. (4T82-83). Finding no constitutional violation, the judge admitted the portion of defendant's interview up until he invoked his right to remain silent. (4T85:12-20). In that portion, the judge found that defendant was very familiar with his rights, which he fully understood. (4T85:12-20). It was not the first time he was mirandized, or the first time he gave a statement. (2T200:23-201:5).

LEGAL ARGUMENT

I. POINT I: CONSPIRACY TO COMMIT KNOWING MURDER IS A VALID CHARGE IN NEW JERSEY

Defendant claims that the judge erred when he instructed the jury to consider conspiracy in relation to the crime of murder and described murder as having the mens rea of purposeful or knowing. This is because, defendant argues, the crime of conspiracy to commit knowing murder does not exist under New Jersey law, which only recognizes conspiracy to commit purposeful murder. Defendant cites a number of New Jersey cases to support his position. However, these cases are inapposite.

Defendant first relies on State v. Harmon, 104 N.J. 189, 203 (1986). In that case, the Supreme Court explained that as it relates to possession of a weapon for an unlawful purpose, the question was not "whether [the defendant] was justified in his use of the gun but whether his purpose was to commit an unlawful act." Id. at 211. The Court explained possession of a weapon for an unlawful purpose is an inchoate crime, just like conspiracy and attempt, which, as defined by the code, also require "conduct that is designed to culminate in the commission of a substantive offense but has not yet achieved its culmination because something remains to be done . . . These offenses always presuppose a purpose to commit another crime." Id. at 203(internal citations and quotation marks omitted).

That conspiracy requires a purposeful state of mind is already set forth in the statute itself. As stated in N.J.S.A. 2C:5-2, "[a] person is guilty of conspiracy with another person or persons to commit a crime if with the **purpose** of promoting or facilitating its commission he . . . " (emphasis added). This means that the conspirators' agreement must have the purpose of committing a crime. But it does not mean that the crime cannot be knowing rather than purposeful. Thus, as long as defendant entered an agreement whose purpose was to knowingly bring about Harris' death, the statute is satisfied.

Defendant next relies on State v. Rhett, 127 N.J. 3, 7 (1992), where the Supreme Court stated: "Although an actor may be guilty of murder if he or she

intended to kill or was practically certain that his or her actions would cause or would be likely to cause death, the actor is guilty of attempted murder only if he or she actually intended the result, namely, death, to occur." This citation is neither here nor there. It pertains to this language in the attempt statute:

> A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:
>
> . . . .
>
> **(2) When causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing such result** without further conduct on his part; or
>
> [N.J.S.A. 2C:5-1 (emphasis added)]

In accordance with the above language, a person attempting to commit murder must purposefully seek the result of death, because death is an element or murder. Defendant's reliance on Rhett would be justified if the conspiracy statute contained similar language. But it does not. And the fact that such language was included in the attempt statute, but not the conspiracy statute, shows that the legislators did not intend for the purpose to accomplish a result to be an element of conspiracy.

Defendant cites to State v. Abram, 256 N.J. Super. 390, 399-401 (1992) for the proposition that "a conspiracy to murder is an agreement only to purposely kill" (emphasis in original). (Db22). Abram does not discuss whether conspiracy to

commit a knowing crime is a valid charge. It simply found that there was no conspiracy because the defendant never entered into an agreement with the alleged co-conspirators. Id. at 401. This finding does not bear on the question at hand. Defendant also mentions a number of other cases, but they all are inapplicable in the same vein.

Instead of relevant New Jersey law, defendant relies on a commentary to the model penal code, which he did not include in the appendix. Even if the commentary is correctly cited, it is contrary to common practice in New Jersey. Although no published decision has directly discussed this issue, the Appellate Division has stated in unpublished cases that knowing murder can be the objective of a conspiracy. State v. Ozorio, No. A-5082-05T4 at *30 (App. Div. Nov. 9, 2007) (stating that to prove a conspiracy to commit murder, the State had to prove "that defendant entered into an agreement with co-defendants with the purpose of promoting or facilitating the purposeful or **knowing** serious bodily injury of [the victim]" (emphasis added); State v. McGraw, No. A-2250-04T4,, at *9 (App. Div. Nov. 8, 2006) ("Conspiracy to commit murder . . . required proof that defendant's conspiracy was to (a) **knowingly** or purposefully cause . . . death, or to (b) knowingly or purposefully cause serious bodily injury resulting in death, knowing 'that the injury created a substantial risk of death and that it was highly probable that death would result.'" (emphasis added)).

Indeed, it is common practice in our state to indict conspiracy to commit knowing murder. This is reflected in the procedural history of published and unpublished cases discussing other issues. See e.g. State v. Marshall, 123 N.J. 1, 27 (1991); State v. Nevius, 426 N.J. Super. 379, 382 n.2 (App. Div. 2012); State v. Welch, No. A-0880-21, at *1-2 (App. Div. July 19, 2023). Also common are indictments for conspiracy to manufacture and distribute drugs under N.J.S.A. 2C:35-5. See e.g. State v. Gargano, 476 N.J. Super. 511, 519-20 (App. Div. 2023). If defendant's position were correct, trial judges would have to instruct every time that for the purpose of the conspiracy charge, the mental state of N.J.S.A. 2C:35-5 can only be purposeful, even though the statute proscribes both knowing and purposeful conduct.

Defendant laments that the jury instructions also referenced serious bodily injury (SBI) murder. (Db24). This reference, he claims, allowed a jury to convict him of conspiracy to commit murder even when it believed he only conspired to cause a serious bodily injury that "happened to kill the victim." (Db24). This argument stems from a misunderstanding of SBI murder. To be guilty of this murder, the actor cannot just cause any injury that "happens" to cause death. Rather, the injury involved must create a substantial risk of death, and the actor must have known that it was highly probable for death to occur. State v. Jenkins, 178 N.J. 347 (2004). Thus, defendant could not have been convicted because he agreed to cause

an injury that fortuitously led to death. He must have had knowledge of the high probability that death would occur. His objection to the jury charge's reference to SBI murder is, in the end, the same contention that the crime of conspiracy to commit knowing murder does not exist. As already discussed above, that contention is not based on New Jersey law.

In the same vein, defendant faults the judge for referring to the conspiracy charge as conspiracy to "criminal homicide," which, defendant claims, includes vehicular homicide under N.J.S.A. 2C:11-2(a). (Db25). Whether this is true or not, the judge only instructed the jury on knowing and purposeful murder. The fact that the term criminal homicide could apply to other types of killings is irrelevant because the jury was never informed of those other types.

Defendant also claims that the jury verdict was inconsistent in that it found him guilty of conspiracy to commit murder, but not purposeful/knowing murder via vicarious liability. (Db28). He claims that this consistency stemmed from instructions that allowed a conviction for conspiracy to murder even if he did not intend a purposeful killing. But the jury's failure to understand vicarious liability is not connected to whether the conspiracy was based on a purposeful or knowing crime. In either case, vicarious liability applies. There is simply no relationship between defendant's acquittal for murder and whether the jury thought he conspired to kill purposefully or knowingly. Inconsistent verdicts may be caused by jury lenity,

compromise, or mistake. State v. Banko, 182 N.J. 44, 53 (2004). Such verdicts are accepted in the legal system. Ibid.

Lastly, even if New Jersey did not recognize conspiracy to commit knowing murder, defendant failed to raise this objection below. To prevail now, he must show that the judge committed a plain error, clearly capable of an unjust result. State v. Camacho, 218 N.J. 533, 554 (2014). Not all jury instruction errors are reversible. In fact, reversal is inappropriate if the error is harmless in the context of other evidence. Ibid. In this matter, the evidence makes clear that defendant actively participated in the conspiracy for the purpose of killing the victim. It was defendant who mentioned that Gross was one of the stealers, and defendant and Lewis discussed splitting the bounty. (25T117). Defendant also returned the drugs that Gross had given to him. (25T128). If the objective had been to rob and obtain additional funds, he would not have returned the drugs. Therefore, even if the court had instructed that conspiracy required purposeful murder, the result would have been the same.

II. POINT II: THE TRIAL COURT CORRECTLY REFUSED TO SUPPRESS DEFENDANT'S STATEMENT

Contrary to his position below, defendant now contends that police lacked reasonable suspicion to stop the SUV. Alternatively, he contends that he was

illegally arrested after he was brought to the station. Either error, he claims, requires the suppression of his statements to the police.

Preliminarily, defendant encouraged Judge D'Arrigo to find that there was reasonable suspicion. (4T57:19-58:4; 81:13-15). In so doing, defendant invited any error the judge made. The invited error doctrine embodies "the common-sense notion that a disappointed litigant cannot argue on appeal that a prior ruling was erroneous when that party urged the lower court to adopt the proposition now alleged to be error." State v. A.R., 213 N.J. 542, 561 (2013) (internal quotation marks omitted). An invited error can lead to a reversal only if it cut mortally into the substantive rights of the defendant. Ibid. In this case, defendant's rights were not violated. The circumstances in this case plainly established reasonable suspicion.

By the time police stopped the black SUV, a credible witness had informed them that a person wearing reflective strips had come and gone near the fence line. That person travelled in a car described as a shiny, new, dark color SUV that could be a Chevy Suburban. Police watched the footage for themselves and saw that the person with reflective strips was involved in the murder. When police first saw the black SUV, it had been two hours since the shooting. Nonetheless, the neighborhood was high crime (2T109), and the appearance of such a car was highly unusual. This was especially so in view of the fact that the crime happened late at night, when

people travelled less, and the chances of having an uninvolved similar-looking car just happening to be around were significantly reduced.

Reasonable suspicion had been found based on less robust facts. This occurred in DelaCruz v. Borough of Hillsdale, where the police investigated two burglaries but "did not uncover any information as to the number or identity of the burglars, their means of conveyance, or the direction of their travel. DelaCruz v. Borough of Hillsdale, 365 N.J. Super. 127, 135-36 (App. Div. 2004). The first burglary was discovered at 6:20 pm on October 24, 1997, and while investigating that burglary, police heard a residential alarm indicating a second burglary. Id. at 135. At about 8:05 p.m, a neighbor reported that a suspicious white van had pulled into her driveway, then pulled back out. Id. at 136-37. Nothing linked this van to the burglaries, and the caller could not give any description of the people in the van. Id. at 137. Yet, when police subsequently stopped a white van, the Appellate Division found that the stop was supported by reasonable suspicion, and that the police did not violate the plaintiff's civil rights. Id. at 145.

In the present case, the description of the vehicle was specifically linked to the crime. It was seen by a witness, and police confirmed that the people the witness saw were involved in the murder. The time distance of about two hours is not significantly more than the distance described in DelaCruz. Thus, reasonably suspicion is amply established.

Regarding whether defendant was subject to a de facto arrest, defendant seems to believe that he was arrested because he was detained for hours and transported to the station. However, neither transportation nor a long detention automatically transforms a stop into an arrest. State v. Dickey, 152 N.J. 468, 482 (1998) (stop may last over two hours if justified by the circumstances); State v. Todd, 355 N.J. Super. 132, 141 (App. Div. 2002) ("To us, it is pivotal that defendant was not arrested when he was placed in the police car to be driven to the "show-up" confrontation with the eyewitness."). Rather, there are no "bright light" tests that distinguish stops and arrests. Dickey, 355 N.J. at 178. Nor are there rigid time limitations that separate the two categories. Ibid. To determine whether a stop has turned into an arrest, courts consider "important factors, includ[ing] unnecessary delays, handcuffing the suspect, confining the suspect in a police car, transporting the suspect, isolating the suspect, and the degree of fear and humiliation engendered by the police conduct." State v. Shaw, 237 N.J. 588, 613 (2019).

The police were diligently investigating this matter. The length of the stop was initially caused by the need to rewatch the video to ascertain that the black SUV was the car involved in the murder. Defendant claims that the police should have asked him questions right where they stopped him. However, this matter was a murder investigation, and a number of things had linked defendant to the crime. His car was similar to the one seen in the video, there was a rubber glove in the car door,

and defendant's stature was similar to that of the assailant. Under such circumstances, police could not pose questions and rely on defendant's words alone. It was appropriate for them to first speak with Brooks Rogers, and Gross to better understand the facts at issue so they could evaluate defendant's answers in light of what they had learned. No delay was made in interviewing those witnesses, and it would not have been appropriate to keep defendant out in the dark while the other interviews took place. After speaking with Brooks, police discovered that Gross was the victim's best friend, and this connection made it even more probable that defendant was involved in the crime. There was thus all the more reason not to let defendant go.

Equally important was the fact that police needed a formal statement in a murder investigation. Defendant was never handcuffed. He was sent to an interview room rather than a holding cell. And he was provided with water and possibly food. (2T168-169).

In any event, a confession following an illegal need not be suppressed "if the chain of causation between the illegal arrest and the confession is sufficiently attenuated so that the confession was sufficiently an act of free will to purge the primary taint." Shaw, 237 N.J. at 614. In other words, the overarching question is whether the confession falls on one side or the other of the line that separates confessions which resulted from an exploitation of an illegal arrest from those which

were the product of the defendant's free will, the taint of the illegal arrest having been sufficiently attenuated. Ibid. This question must be answered on the facts of each case. No single fact is dispositive. Ibid. The factors considered by courts are: (1) the temporal proximity of the arrest and the confession, (2) the presence of intervening circumstances, and, (3) the purpose and flagrancy of the official misconduct. Ibid.

The first factor is the least determinative due to its ambiguity; a long detention could suggest increasing pressure or dissipation of the initial shock of arrest, and a short detention could indicate the confession was a product of the initial shock or that the confession was unrelated to the arrest. Id. at 615. The conditions of the unlawful detention should be considered because they can be as important as the temporal proximity. Ibid. A congenial atmosphere can neutralize the assumption that a confession given after a short period of detention is the product of an illegal arrest. State v. Chippero, 164 N.J. 342, 355 (2000).

Intervening events, which serve as objective indications that the causal connection between the arrest and confession has been broken, can be the most important factor in determining whether a confession is tainted. Ibid. The presence or absence of miranda warnings should be considered in determining whether a confession is obtained by exploitation of an illegal arrest, but "such warnings are not always sufficient to 'break … the causal connection between the illegality and the

confession.'" Ibid. A defendant's confession in response to the first question posed to him can be considered a sufficient intervening circumstance. Id. at 356.

The third and final factor is the purpose and flagrancy of police misconduct, which is particularly relevant to determining whether a confession is the fruit of the illegal arrest. Id. at 357. That factor requires consideration of the manner in which the defendant was arrested, detained, and interrogated. Ibid. Circumstances that weigh in favor of suppression include the fact that the arrest was obviously improper and was calculated to cause surprise, fright, and confusion. Ibid.

Here, defendant made incriminating statements within two hours of being taken to the station. That time frame could weigh in favor or against suppression and is therefore ambiguous. However, the police' interactions with defendant were congenial. At no point did they accuse defendant of a crime. In fact, they told him he was not under arrest and politely asked for his cooperation. Thus, the temporal factor weighs against suppression.

Regarding the intervening circumstances, defendant was thoroughly mirandized. Moreover, after Miranda was complete, defendant admitted the car was his, stating "I got a new car" in response to the very first question. (2T185). He then admitted that no one drove that car but him within the next two questions. (2T185).

This was a sufficient intervening circumstance to break the causation chain. Id. at 356.

Lastly, any arrest that took place was not obviously improper. Police had an opportunity to compare the black SUV with the vehicle captured on camera. A credible witness had described seeing a similar car, and based on the video, the police knew the witness saw the perpetrators. Defendant's stature matched what police had seen on the video, and there were rubber gloves in the car – potential evidence for crime. Under these circumstances, requiring defendant to go to the station and answer a few questions is not obviously improper. No action was taken to surprise or confuse defendant. Rather, defendant was provided with water and police were polite in their questioning.

It is also important to note that the ultimate question is whether defendant's statements were the product of free will. Throughout the interview, defendant demonstrated that he knew his rights and was not fearful of the police. He demanded to know "what the fuck" was going on, stated that he understood his rights because he had been arrested before, and when he wished to end the interview, he invoked his right to remain silent. These facts make clear that defendant's free will was not compromised. Therefore, suppression would not have been proper.

Lastly, even if suppression should have been granted, the error was harmless beyond a reasonable doubt. Whether defendant admitted that the black SUV belonged to him or not, the vehicle contained his personal IDs, cards, and a rental agreement in which he signed as the authorized driver. Similarly, whether he admitted that he was the only one to drive the car, Gross already testified to his involvement. Gross' testimony, along with the documents in the car, and the fact that defendant was found driving it would have left no doubt that it was defendant who drove the perpetrators to and from the crime scene. Therefore, defendant's admissions had minimal effects and the failure to suppress them was harmless beyond a reasonable doubt, even if erroneous.

III. POINT III: CARLTON RESENTENCING IS APPROPRIATE BUT THE JUDGE DID NOT ERR OTHERWISE

Following his conviction by the jury, the State moved to sentence defendant as a persistent offender under N.J.S.A. 2C:44-3(a). That section authorizes an enhanced sentence for individuals who: (1) are convicted of a first or second-degree crime and were over 21 years of age at the time of the crime, (2) have previously been convicted on two separate occasions of two crimes committed at different times, and (3) committed the last of these previous crimes within 10 years of the present crime, or were released from confinement for that crime within 10 years of

the present crime. Based on defendant's criminal record, the judge granted the State's motion. (34T79). After finding aggravating factors 3 (risk of reoffending), 6 (prior criminal record), and 9 (deterrence), and no mitigating factors, the judge imposed a sentence of 36 years of incarceration subject to NERA. (34T71, 80).

Defendant argues that pursuant to State v. Carlton, 480 N.J. Super. 311 (2024), which was issued in the wake of Erlinger v. United States, 602 U.S. 821 (2024), his sentence must be reversed because only a jury, not a judge, can find that he satisfies the elements of the extended term statute. (Db44). Carlton does teach that pursuant to the Fifth and Sixth amendments, only a jury can make such findings. However, it also provides that if persistent offender status was determined by the judge rather than a jury, the remedy is to remand the matter for the empaneling of a sentencing jury. 480 N.J. Super. at 42. Thus, the appropriate remedy is not to remand for resentencing without extended term, as defendant suggests, but to remand for the elements of N.J.S.A. 2C:44-3(a) to be decided by a jury.

Next, defendant claims that the judge mistakenly believed that his applicable sentencing range was from 20 years to life, when in reality, it was 10 years to life. He further pointed out that this caused the judge to believe that the midpoint of the range was 42.5 years, which set the judge on the wrong track. Preliminarily, a life term, for the purpose of calculating sentencing range, is 75 years. State v. Francisco, 471 N.J. Super. 386, 428 n.9 (App. Div. 2022). The midpoint between 20 and 75 is

not 42.5, but 47.5. The judge's number, 42.5 is the midpoint between 10 and 75. So even if defendant is correct that the range is 10 to 75, he was not prejudiced by the judge's midpoint calculation.

Furthermore, it is well-established that "when the aggravating factors preponderate, sentences will tend toward the higher end of the range." Id. at 428. The judge found three aggravating factors and no aggravating factors. So defendant should have been sentenced to more than 42.5 years. Yet he received only 36 years. He was therefore not at all prejudiced.

It should be noted that the enhanced range for persistent offender who committed a first degree offense is, by statute, 20 years to life. N.J.S.A. 2C:43-7(a)(2). In State v. Pierce, the Supreme Court found that the range should begin with the minimum of the ordinary, not extended range due to concerns that the factual basis for extended terms was not determined by a jury. State v. Pierce,188 N.J. 155, 169 (2006). That being the case, defendant's minimum sentence pursuant to Pierce was ten years. However, Carlton now mandates a jury, and Pierce's rationale for lowering the minimum set by statute to that of the ordinary range no longer exists.

Defendant also claims that the judge double counted by relying on his prior convictions both to establish extended term eligibility and to find aggravating factors. (Db45). This is simply not true. Defendant has an extended criminal record

that reflects numerous convictions beyond the predicates for an extended term. (PSR6-7). The judge properly considered defendant's age, the persistent nature of his prior offenses, and his personal circumstances. (34T68-72). He did not engage in any double counting.

CONCLUSION

For the reasons stated above, defendant's conviction should be affirmed and his sentence remanded for the empaneling of a sentencing jury.

Respectfully submitted,

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